

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 44

**CHARLES PEYTON WEST AND MAURICE JOHN
WEST, PETITIONERS,**

vs.

AMERICAN TELEPHONE AND TELEGRAPH CO.

No. 45

**CHARLES PEYTON WEST AND MAURICE JOHN
WEST, PETITIONERS,**

vs.

AMERICAN TELEPHONE AND TELEGRAPH CO.

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 9, 1941

CERTIORARI GRANTED MAY 6, 1941.

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Caption

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CAPTION.

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, SS:

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio in the cause and matter hereafter stated. Said action was commenced on the 14th day of July, 1937 and proceeded to final disposition on the 2nd day of July, 1938, and during the progress thereof pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

Present: THE HONORABLE S. H. WEST,

United States District Judge.

CHARLES PEYTON WEST
MAURICE JOHN WEST

vs.

THE AMERICAN TELEPHONE AND
TELEGRAPH COMPANY.

No. 5622 EQUITY.

BILL OF COMPLAINT.

(Filed July 14, 1937.)

To the Honorable Judges of the District Court of the United States, for the Northern District of Ohio, Eastern Division:

Plaintiff, Charles Peyton West, is a citizen of the State of Pennsylvania.

Plaintiff, Maurice John West, is a citizen of the State of Ohio.

Defendant, The American Telephone and Telegraph Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen of said state, and is qualified in and doing business in the State of Ohio.

This Court has jurisdiction of this action for the following reasons:

(1) This controversy is between citizens of different states, as above set forth;

(2) The value of the matter in controversy herein exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

The ultimate facts upon which plaintiffs ask relief are as follows:

1. Plaintiffs are the sons and only children of Charles P. West, Deceased, who died on March 21, 1926, leaving a Last Will and Testament which was admitted to probate and record in and by the Probate Court of Cuyahoga County, Ohio, as shown in Cause No. 154,617 of Docket No. 191, of said Probate Court.

2. By the terms of said Last Will and Testament, Charles P. West, Deceased, gave, devised and bequeathed to his widow, Grace C. West, the use and income of his property for the period of her natural life, and directed that after the death of his said wife all of his property be divided equally between the plaintiffs, share and share alike. Said Will nominated said Grace C. West as Executrix thereof, and she was duly appointed and qualified as such Executrix.

3. At the time of his death said Charles P. West was the owner of Ninety-two (92) shares of the capital of the defendant. After his death, the defendant caused or permitted the transfer of the certificates for said shares previously in the name of said Charles P. West, to Grace C. West, without regard or reference to the limitations placed

upon her estate or interest in said shares, or the limitations contained in the Will of said decedent, or the rights or interests of the plaintiffs in and to said shares, although the defendant had theretofore received and was then possessed of a copy of said Will of said decedent, duly certified by said Probate Court as a true copy thereof, and well knew the terms and conditions thereof, and of the qualified rights and interest of Grace C. West in and to said estate, and of the rights and interests of the plaintiffs therein.

4. Thereafter, prior to November 2, 1929, wholly without the knowledge of or consent of these plaintiffs or either of them, said Grace C. West in the State of Massachusetts assigned and delivered said certificates for Ninety-two (92) shares so issued to her to Paine, Webber & Company, stock brokers of New York City; said Paine, Webber & Company was a purchaser for value of said Ninety-two (92) shares in good faith and without notice of the rights and interests of the plaintiffs therein.

5. On November 2, 1929, the defendant, with full knowledge of and without further inquiry as to the rights and interests of plaintiffs, and without securing their consent as required by said Will, transferred said shares and registered same on its books in the State of New York to said Paine, Webber & Company.

6. Plaintiffs had no knowledge of said wrongful acts of the defendant and of Grace C. West until March, 1934.

7. Plaintiffs about June 2, 1934, filed an action against the defendant for the recovery of their said loss, being Cause No. 408,792 of the Docket of the Common Pleas Court of Cuyahoga County, Ohio, and said Court, upon final hearing, entered judgment for the plaintiffs; and on review of said cause by the Court of Appeals of Cuyahoga County, Ohio, in Cause No. 15504 of the Docket of said Court of Appeals, the Court of Appeals reversed said judgment upon the ground that plaintiffs had failed to demand of the defendant the return of the certificates representing said shares of capital.

8. On January 20, 1937, the Supreme Court of Ohio overruled plaintiffs' motion to certify the record of said cause.

9. Accordingly, on June 18, 1937, the plaintiffs made a demand on the defendant to restore said shares and to pay them the dividends thereon from November 2, 1929, with interest at 6% on said dividends, and to pay for the difference in market value of said shares between the highest intermediate market value during the interval from Novem-

ber 2, 1929, to the date of the demand, and the market value at the time of the demand, with interest thereon at 6% from the date of said demand, and further demanded that without waiving any rights or remedies or in any way limiting the extent or amount of any right of action or right of recovery which they at the time or thereafter might have against defendant by reason of said wrongful transfer, defendant restore to them whatever rights or remedies they may theretofore have had, may then have had, or may thereafter have by reason of said wrongful transfer.

10. Prior to November 2, 1929, that is, at the time of said unlawful assignment and sale of said shares by Grace C. West to said Paine, Webber & Company in the State of Massachusetts, such act of sale and assignment, by and according to the law of said State of Massachusetts, as announced in the cases decided in said State, terminated the use and possession of Grace C. West as life tenant and invested these plaintiffs as remaindermen with the immediate use and possession of said shares.

11. On November 2, 1929, that is, at the time defendant wrongfully registered and transferred said Ninety-two (92) shares to said Paine, Webber & Company, in the State of New York, the owner of shares of stock, was entitled, by and according to the decisions of the courts of said state, in case of wrongful registration of transfers of corporate shares, not only to restoration of the shares with all mesne dividends thereon, but also to the difference in market value between the highest intermediate value and the value at the time of the demand, with interest on such difference.

WHEREFORE plaintiffs pray for an order requiring the defendant to issue and deliver to the plaintiffs a certificate for Ninety-two (92) shares of the capital stock of the defendant; for an accounting from the defendant for all dividends paid on said stock since November 2, 1929, and interest thereon, and for damages representing the difference in market value of said shares between the highest intermediate value and its value at the time of said demand with interest thereon from the time of said demand; that the defendant be required and ordered to restore to plaintiffs whatever rights or remedies they may heretofore have had or may now or hereafter have by reason of the acts of the defendant hereinbefore complained of; that the Court determine and declare the rights and obligations of the parties hereto, and for such other and further relief as justice and equity may require.

Further plaintiffs pray that the Clerk issue a subpoena upon the defendant The American Telephone and Telegraph Company.

GARFIELD, CROSS; DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,

Attorneys for Plaintiffs.

(Duly Verified.)

ANSWER.

(Filed September 15, 1937.)

Now comes the defendant, The American Telephone & Telegraph Company, and admitting the citizenship of the plaintiffs and the defendant as alleged, that the defendant is qualified in and doing business in the State of Ohio and that the controversy is between citizens of different states involving an amount in excess of \$3,000.00, exclusive of interest and costs as alleged, for its answer herein says:

FIRST DEFENSE

1. For its first defense the defendant avers that the plaintiffs' alleged cause of action accrued more than four years prior to the filing of the plaintiff's petition herein and is barred by the statute of limitations prescribed by the General Code of Ohio.

SECOND DEFENSE

2. For its second defense the defendant avers that on June 2, 1934, the plaintiffs herein filed a petition in the Court of Common Pleas of Cuyahoga County, Ohio, against the defendant herein, said cause being No. 408,792 on the docket of said court.

3. In said petition the plaintiffs alleged in substance as follows: The plaintiffs are the sons and only surviving

children of Charles P. West, deceased, who died March 21, 1926, leaving a Last Will and Testament admitted to probate in the Probate Court of Cuyahoga County, Ohio, in accordance with docket No. 191, No. 154,617. By the terms of said will Charles P. West bequeathed to his widow, Grace C. West, the use and income of all his property for the period of her natural life and after her death directed that said property be divided between the plaintiffs. Grace C. West was nominated as Executrix, qualified and acted as such. Charles P. West at the time of his death was the owner of 92 shares of the capital stock of the defendant. On January 14, 1927, without the knowledge of the plaintiffs, defendant wrongfully permitted the certificates for said shares to be transferred to Grace C. West without limitation. The defendant knew the terms and conditions of the will of Charles P. West and of the limitations upon the estate of Grace C. West. On November 4, 1929, without the knowledge or consent of the plaintiffs, the defendant wrongfully permitted the sale and transfer of said 92 shares of its common stock by Grace C. West to persons unknown. Plaintiffs have no knowledge of these wrongful acts of the defendant prior to March, 1934. The defendant was at all times informed as to the nature of the interests of Grace C. West and of the plaintiffs in said shares of stock and that as a direct and proximate result of the defendant's wrongful acts the plaintiffs were damaged in the amount of \$25,000. The prayer of said petition was for damages in the sum of \$25,000, with interest from November 4, 1929.

4. Thereafter the defendant filed an answer substantially as follows: For its first defense the defendant alleged that on January 14, 1927, Grace C. West duly filed in the Probate Court of Cuyahoga County, Ohio, an application reciting that the debts of said estate had been paid; that there remained in her hands, among other stock, 92 shares of the common stock of this defendant; that all of said stocks were bequeathed to Grace C. West for and during her natural life and asking the Court to transfer said stock to her. The plaintiffs consented to such distribution in writing, and thereupon said Probate Court issued its order whereby it granted said application and authorized said Grace C. West to "distribute in kind and transfer unto herself as the widow of said Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks, as prayed for." The plaintiffs knew of and consented to the making of said order and the disposition of said stock to Grace C. West. Shortly thereafter Grace C. West tendered to the defendant certificates of stock for 92 shares, duly endorsed

by her as Executrix, and requested the issuance of a new certificate for said shares in her name and submitted therewith among other papers a copy of the will of Charles P. West, deceased, a copy of her letters of administration, a copy of said application for distribution and a copy of said order of the Probate Court directing distribution and thereupon the defendant issued a new certificate to her. On or about November 4, 1929, said certificate of stock for 92 shares was delivered to the defendant by Paine, Webber & Co., brokers, with offices at 25 Broad Street, New York City, with a power of attorney attached duly executed by Grace C. West, assigning and transferring said stock to Paine, Webber & Co. Thereupon the defendant transferred said stock in accordance with said assignment and in conformity with the Uniform Stock Transfer Act of the State of New York. It was further alleged that Grace C. West was still living. Other than as admitted the allegations of the petition were denied.

5. By way of second defense defendant averred that the will of Charles P. West contained no provision for a trustee of his property and gave his widow, Grace C. West, possession of all property during her life without requiring her to furnish any bond; that in such case it was the uniform practice of the Probate Courts of Ohio to order distribution of personal property to the life tenant without requiring a bond and to direct shares of stock to be transferred to the name of the life tenant without limitation; that this practice was known to the plaintiffs; that the plaintiffs knew of the intention of the Executrix to make distribution in conformity with said practice and that the plaintiffs expressly consented in writing to such distribution. The plaintiffs made no request at any time that said certificates be transferred in such form as to set forth the life tenancy of Grace C. West and made no application at any time to the Probate Court to require the said Grace C. West to execute in their favor a refunding bond or other security for their protection in the event that said Grace C. West converted said stocks to her own use. The defendant transferred said stock to Grace C. West in her individual name, relying upon the order of the Probate Court directing such distribution, and upon the conduct of the plaintiffs as previously set forth, and that in consequence the plaintiffs are estopped to deny the legality and propriety of said transfer.

6. For its third defense the defendant alleged that the cause of action accrued more than four years prior to the

filing of the plaintiffs' petition and was barred by the statutes of limitations as provided by the General Code of Ohio.

7. By way of reply the plaintiffs filed a general denial.

8. Said cause was thereafter tried in the Court of Common Pleas on the evidence and judgment was rendered in said court in favor of the plaintiffs. Said judgment was thereafter reviewed and reversed by the Court of Appeals of Cuyahoga County and final judgment was rendered by said Court of Appeals in favor of the defendant herein. A true copy of the final entry in said cause is hereto attached marked "Exhibit A."

9. Thereafter the plaintiffs duly filed a motion in the Supreme Court of Ohio to require said Court of Appeals of Cuyahoga County to certify its record in said cause. The plaintiffs alleged in said motion that the Court of Appeals had reversed a judgment of the Common Pleas Court in favor of the appellants and entered "final judgment against the appellants (plaintiffs herein) and in favor of appellees (defendant herein)." The plaintiffs in said motion further alleged that there was "probable error" in the proceedings of said Court of Appeals. After hearing the Supreme Court of Ohio denied said motion to certify. All issues now sought to be raised by the bill of complaint filed herein were thus finally and fully adjudicated between the parties hereto and said final judgment is a bar to this proceeding.

THIRD DEFENSE

For its third defense the defendant—

10. Admits the allegations of paragraph 1 of the bill.

11. Admits the allegations of paragraph 2 of the bill.

12. Answering paragraph 3, admits that at the time of his death Charles P. West was the owner of 92 shares of the common capital stock of the defendant and avers that on or about January 14, 1927, Grace C. West filed in the Probate Court of Cuyahoga County, Ohio, an application reciting that the debts of said estate had been paid; that there remained in her hands, among other stocks, 92 shares of the common stock of this defendant; that all of said stocks were bequeathed to her for and during her natural life and asking the Probate Court to transfer said stocks to her; that the plaintiffs consented to such distribution in writing; that thereupon said Probate Court issued its order whereby it granted said application and authorized said Grace C. West to "distribute in kind and transfer unto her-

self as the widow of said Charles P. West, deceased, and the distributee entitled thereto the aforesaid stocks, as prayed for"; that the plaintiffs knew of and consented to the making of said order and to the transfer of said stock to said Grace C. West without limitation; that shortly thereafter Grace C. West tendered to the defendant for transfer certificates for said 92 shares of stock, duly endorsed by her as Executrix of the estate of Charles P. West, deceased, and requested the issuance of a new certificate for said amount in the name of Grace C. West; that she submitted therewith duly certified copies of the will of Charles P. West, deceased, of her letters of administration and of said application for distribution with the consent of the plaintiffs, endorsed thereon, and of the order of said Probate Court directing distribution to her, and that thereupon and relying thereon this defendant issued a new certificate of common stock in her name without limitation. Other than as herein admitted or otherwise expressly averred defendant denies the allegations contained in paragraph 3 of the bill.

13. Answering paragraph 4 of the bill the defendant avers that on or about November 4, 1929 said certificate for said 92 shares of stock was delivered to the defendant in New York by Paine, Webber & Co., brokers with offices at 25 Broad Street, New York City, with power of attorney attached, duly executed by Grace C. West, assigning and transferring said stock to said Paine, Webber & Co. Defendant admits that Paine, Webber & Co. was a purchaser for value of said 92 shares in good faith and without notice of the rights and interests of plaintiffs therein. Except as herein admitted or otherwise alleged the defendant denies the allegations of paragraph 4.

14. Answering paragraph 5 of the bill the defendant avers that on November 4, 1929, at the request of Paine, Webber & Co. and in accordance with the authority contained in the papers referred to in paragraph 4 hereof, it transferred said shares and registered the same on its books in the State of New York as requested by said Paine, Webber & Co. Otherwise than as herein alleged the defendant denies the averments contained in paragraph 5 of the bill.

15. The defendant denies the allegation contained in paragraph 6 of the bill.

16. Answering paragraph 7 of the bill the defendant admits that the plaintiffs filed an action in the Court of Common Pleas of Cuyahoga County, Ohio, as alleged; ad-

mits that upon final hearing the Common Pleas Court entered a judgment for the plaintiffs; admits that on review of said cause by said Court of Appeals of Cuyahoga County, Ohio, the Court of Appeals reversed said judgment; denies that it reversed said judgment upon the ground that the plaintiffs had failed to make a demand upon the defendant and avers that said Court entered final judgment in favor of this defendant as more fully set forth in the Second Defense herein.

17. The defendant admits the allegation contained in paragraph 8 of the bill.

18. Answering paragraph 9 the defendant admits that on June 18, 1937, the plaintiffs made a demand upon the defendant but begs leave to refer upon trial to an exact copy of that demand for the terms and conditions thereof.

19. The defendant denies the allegations contained in paragraph 10.

20. The defendant denies the allegations contained in paragraph 11.

21. The defendant further avers that Grace C. West was living at the time of filing the bill of complaint herein.

FOURTH DEFENSE

Referring to the admissions and denials contained in its third defense herein the defendant incorporated the same and for its fourth defense avers:

22. At the time of distribution of the estate of Charles P. West in 1927 the plaintiffs, then more than twenty-eight years of age, were making their home with their step-mother, who was also their aunt, Grace C. West. They knew or are charged with knowledge of the manner in which she distributed the estate of Charles P. West. At no time did the plaintiffs apply to the Probate Court of Cuyahoga County to require Grace C. West to put up a redelivery bond or to give other security for the handling of an estate of approximately \$40,000. In 1927 this estate, partly in cash, partly in notes and partly in stock, was distributed in practically its entirety to Grace C. West without any bond being required of her either by the terms of the will of Charles P. West or at the request of these plaintiffs. They consented to the orders of distribution for which she asked, hereinbefore referred to. They collected and transferred to her substantial amounts of cash that belonged to the estate without requiring any security for its redelivery. They made no inquiry at any time between January, 1927,

and November, 1929, when if notified the defendant might have protected itself against the claim now made, either of the defendant or of Grace C. West as to the manner in which this stock had been distributed and transferred. By reason thereof the plaintiffs are guilty of the grossest laches and are now estopped to deny the legality and propriety of said transfer and from making each and several the claims asserted herein.

WHEREFORE, having fully answered, the defendant prays that it may go hence with its costs.

TOLLES, HOGSETT & GINN,
WILLIAM B. COCKLEY,

*Attorneys for the defendant, The American
Telephone & Telegraph Company.*

(Duly Verified.)

EXHIBIT A.

"Charles Payton West, et al.

No. 408792

vs.

No. 15504—Law

American Telephone & Telegraph Co.

Court of Appeals of Ohio, Eighth District, Cuyahoga
County.

On the 9th day of November, 1936 there was filed in this court a Mandate from the Court of Appeals, which is as follows, to-wit:

This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies, that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed for reason stated in opinion on file and final judgment is hereby rendered for appellant, no other error appearing in the record, and this cause is remanded to said Court of Common Pleas.

It is therefore considered that said appellant recover of said Appellee its costs herein.

ORDERED, that a special mandate be sent to said Court of Common Pleas, to carry this judgment into execution. The appellee excepts.

I, John J. Busher, Clerk of our said Court of Appeals, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said court.

Witness, my hand and the seal of said Court, at Cleveland, this 9th day of November, A. D. 1936.

(Seal) JOHN J. BUSER, *Clerk,*
By EDWARD T. MURRAY, *Deputy.*

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, CUYAHOGA COUNTY.

To the Honorable Court of Common Pleas in and for the County of Cuyahoga, Greeting:

You are Hereby Commanded, that, without delay, you cause the foregoing judgment of our said Court of Appeals to be carried into complete execution.

Witness, John J. Buser, Clerk of our said Court of Appeals, and the seal thereof, at Cleveland, this 9th day of November, A. D. 1936.

(Seal) JOHN J. BUSER, *Clerk,*
By EDWARD T. MURRAY, *Deputy.*

REPLY.

(Filed December 17, 1937.)

Plaintiffs herein, for reply deny each and every averment in defendant's answer not consistent with their petition herein, or not in said petition or in this reply admitted to be true.

GARFIELD, CROSS, DAoust, BALDWIN & VROOMAN,
H. L. DEIBEL,

Attorneys for Plaintiffs.

(Duly verified.)

TRANSCRIPT OF PROCEEDINGS ON TRIAL.

December 17, 1937.

(Filed October 3, 1938.)

WEST, J.

APPEARANCES:

For the plaintiffs: Harry L. Deibel, Esq.; and
Clare M. Vrooman, Esq., of Messrs. Garfield,
Cross, Daoust, Baldwin & Vrooman.

For the defendant: William L. Cockley, Esq., of
Messrs. Tolles, Hogsett & Ginn.

Mr. Vrooman: Your Honor, this action is brought upon a bill of complaint of Charles Peyton West and Maurice John West, the only sons and children surviving of the late Charles P. West. The bill of complaint reveals that Charles P. West died on the 21st of March, 1926, leaving a last will and testament which was admitted to probate in Cuyahoga County probate court.

Mr. West was a resident and was domiciled in this county, and his will was made here. He lived here, I believe, all his lifetime and the will was filed in probate court in Cuyahoga County, and the estate was administered in this county.

The deceased provided in his last will and testament that his widow, Grace C. West, who was the sister of a deceased wife of the decedent, therefore not only a step-mother but an aunt of the two plaintiffs, was given a life estate during her natural lifetime in all his property and that it was to be divided equally, to be divided share and share alike between the two plaintiffs. And the will named Grace C. West as executrix. She was duly appointed and qualified, and some time, I believe about February, 1927, came in with an application to distribute in kind. As I recall it, the estate contained items which were appraised at some thirty six thousand dollars. I have the probate court records here and will introduce them in due course. Among the assets of the estate were certificates for 92 shares of the stock of the American Telephone & Telegraph Company, in the name of Charles P. West, the deceased. The application for a distribution in kind was approved by the court. It was consented to at the bottom, that is, there was a form, at least, which will be introduced, which was signed by the two plaintiffs.

Now, when the stock was actually transferred, instead of being transferred to Grace C. West with any limitation whatsoever, it was transferred to Grace C. West individually, that is, without limitation, although at the time

she presented the stock for transfer she also presented a copy of the will and a copy of the order for distribution, which is admitted by the defendant.

This matter was brought out in the state court, and the result was a judgment for the plaintiffs for some twenty-one thousand dollars, with interest from November 4, 1929, at which time Grace C. West turned this stock over, indorsed it over to Paine, Webber & Company, and it was transferred at their New York office between November 2 and November 4—I believe the date in the stipulation is November 4, 1929—to Paine, Webber & Company. The plaintiffs learned of this transfer in March, 1934, at the very end of March of that year an inquiry was made,—I believe the letter advising that Grace West had no stock in the A. T. & T. Co. came in the first few days in April, but I think Mr. Maurice J. West wrote, having been advised something might have happened, he immediately wrote and received word that she held no stock in the A. T. & T., and the action was filed the following June, with the result that I have stated.

The common pleas court case was tried before Judge Skeel and resulted in a judgment and the court of appeals reversed that, we say, on the ground that no demand was made prior to the filing of the suit. We have set up the filing of a demand in accordance with that opinion of the court of appeals. The opinion was a published opinion and we have it here and we now say that because the demand has been made and because the court of appeals found that a wrong had been done, we are now entitled to the value of the stock, the defendant having refused to deliver the 92 shares of stock back to the plaintiffs.

And the theory upon which this is based is that there has been an acceleration in the life of the stepmother, Grace C. West. In other words, the remaindermen are now entitled to the estate because this defendant, by its wrongful act, permitted the transfer, although it had notice of the last will and testament, the terms thereof, and knew that the stock belonged to Grace C. West only as life tenant of Charles P. West, deceased, under his will,—nevertheless permitted the transfer of the stock and the final transfer to her individually, and the final transfer from Grace C. West as an individual on November 4, 1929.

The Court: Is Grace C. West still living?

Mr. Vrooman: Still living, your Honor. She is not a party to this action. I believe she is living in Boston at this time.

I have this one further point: Grace C. West lived here in Cleveland at the time of the decedent's death. She

later lived in Boston, and the stock was turned over to Paine, Webber & Company while she resided in Boston, that is, in November 1929, and the conversion of which we complain, we say occurred in Massachusetts, that is in Boston, at that time. We believe that we have rights here based upon the wrong which has been done upon the conversion, and we come into equity to have those rights determined by this court.

Mr. Deibel has called my attention to the fact that Mrs. Grace C. West actually parted with the stock, turned it over to Paine, Webber & Company, on the 31st of October, 1929. It will appear that the certificate, if there is testimony on that point, for some reason, was shipped to the Cleveland office by mistake. The stipulation may be silent on that particular point; but arrived at New York, on the 2nd of November, 1929 and was actually transferred from Grace C. West to Paine, Webber & Company on the 4th of November, 1929.

We believe that the wrong here was in permitting Grace C. West, after the defendant had given her the right to transfer originally or had put it in her name, we believe the defendant had a heavier duty imposed upon it by that fact, because it knew the relationship which she bore to this estate and that therefore, by permitting first the transfer to her, and then with knowledge of that, by permitting the transfer from her to anybody else, the wrong was done for which the defendant is answerable to these plaintiffs.

The Court: Mr. Cockley.

Mr. Cockley: May it please the court, we have set up in our answer here four, I think, separate defenses, and I think none of them will involve very much dispute as to the facts.

First we set up the separate defenses both of the statute of limitations of four years, and laches and estoppel by reason of the failure of these plaintiffs to make any inquiry of any kind between 1927 and the time they filed this suit in 1937. They allege, to get rid of the statute of limitations, they were without knowledge of the transfer by the A. T. & T. Co. into Grace West's individual name, and by Grace C. West subsequently to Paine, Webber & Company. But that is the most they allege, mere want of knowledge, and there will be some evidence upon that point, which will necessarily be in the matter of cross examination of plaintiffs as to what they did.

The second defense set up here is that this matter has been adjudicated and a final judgment has been rendered in favor of this Telephone Company and against these plaintiffs.

As Mr. Vrooman stated to you, this case was tried on the merits in the court of common pleas. All the evidence that will be introduced here, virtually all of it, was introduced there, and the court found for the plaintiffs, the common pleas did, and rendered a judgment against the defendant for some twenty nine thousand dollars, being the full money value of the stock, of all the stock, disregarding the life estate in Grace C. West, as of November, 1929, plus interest.

We prosecuted error to the court of appeals, and the court of appeals, by its final judgment in that case, reversed the court of common pleas and entered judgment for the defendant and against the plaintiffs. It said:

"For reasons stated in this opinion on file."

No opinion was filed, but the court did furnish the opinion to counsel, and it is argued on the other side that that opinion indicates what the court really intended but that was not what it did hold, but that because of failure to make a demand the action was prematurely brought and that the court should have remanded the case to the court of common pleas with instructions to dismiss without prejudice.

But the judgment in this case is a judgment for the defendant in the ordinary form and purports to be on the merits.

Subsequently the plaintiffs prosecuted error complaining of that judgment. I should say prosecuted error and motion to certify in the Supreme Court of Ohio. It was argued on both sides on the merits, not upon the question of whether or not a demand was properly made, and the Supreme Court refused to review the judgment, denied the motion to certify. We shall claim to your Honor that that judgment was a complete bar. Perhaps it might have been raised by motion, if the plaintiffs in this case had in their reply admitted the allegations of the answer in that respect, although they will stipulate so that it will be before the court when it comes to it.

The Court: I find no reply in the papers.

Mr. Vrooman: Your Honor, the reply is here. It has not been filed. I would like leave of court to file it at this time.

The Court: Any objection?

Mr. Cockley: No; I have no objection.

The Court: It will be received and filed.

Mr. Cockley: I might call your attention at this time to the language of the journal entry or the mandate of the court of appeals which was spread on the common pleas docket, and attached as Exhibit A to our answer, and it says:

"And the judgment of the said court of common pleas is reversed for reason stated in opinion on file and final judgment is hereby rendered for appellant, no other error appearing in the record, and this cause is remanded to said court of common pleas. It is therefore considered that said appellant recover of said appellee its costs herein."

We were of course the appellant and they were the appellees.

Now, the third defense is, I suppose we may say, a general denial for admittance of evidence, denying that there was ever any cause of action in this case. And it is our claim that by reason of certain proceedings that occurred in the probate court, these plaintiffs not only knew of, but consented to the transfer of this stock to the name of Grace C. West.

Grace C. West, in January, 1927, as executrix, made an application to the probate court of this county in which she set forth the securities in the estate, including the stock of the American Telephone & Telegraph Co., reciting that by the terms of the will she was given a life estate only, but in her prayer says: "Your applicant therefore asks the court to transfer said stocks to her the within named Grace C. West," and she signed it, and there was a consent to that, "We, the undersigned Charles P. West and Maurice J. West,"—that is the plaintiffs,—“hereby consent to the foregoing distribution in kind,” signed by them. And we say that is a consent to do precisely what was afterwards done, viz., transfer the stock into the name of Grace C. West, without limitation.

The order of the probate court made pursuant to that application, directed, after reciting the application, the payment of debts, the terms of the will, that she had a life estate, ordered that the stock be distributed to Grace C. West, the widow of Charles P. West and the distributee entitled thereto, without any limitation of her right of any kind. And upon being furnished—the American Telephone & Telegraph Company in New York, where it has its transfer office,—upon being furnished the copy, certified copy, of the will of Charles P. West, of Grace C. West's appointment as executrix, and this application with the consent of the two plaintiffs signed to it, and with the order of the probate court, felt justified in issuing the new 92 shares of stock, a new certificate for 92 shares of stock, in the name of Grace C. West, without limitation. Of course that made it possible for Grace C. West there-

after, under the Uniform Stock Transfer Act of New York, Massachusetts, Ohio, and every other state where they have them, to transfer the title of that stock by mere indorsement and delivery of that certificate, and that is what she subsequently did, through Paine, Webber & Company, in accordance with the testimony.

We shall argue to your Honor that these consents constituted a consent to the distribution and to the transfer of the stock precisely as it was made.

I have already referred to the statute of limitations and to laches, and those, if your Honor please, are our defenses.

Let me say one word on behalf of Mr. Vrooman and myself. We have arranged the record largely by stipulation; perhaps some examination of one witness. We had thought in the first instance to stipulate the record as it was in the Common Pleas Court, and then the problem arose, that if we did that, whether your Honor would be charged with the same rulings on review which the lower court had made in that case; and with the admissions, and so on, in the testimony, it seemed to us to create a rather impossible record, to do that, and rather than try to read that, and parts of it, we shall simply put on the principal witness and have him examined both on direct and redirect, and make up a new record.

Mr. Vrooman: Just by way of clarification so that the Court may understand the contentions of counsel in advance, in its opinion, the Court of Appeals said:

"As we have heretofore stated, these appellees are entitled to some relief against this corporation. In our judgment they are entitled to demand of the company the return of these certificates of stock, or of other stock of equal par value, the same to be issued in such a manner as will protect the interests of all parties concerned, and will insure to these appellees the possession of the certificates and dividends thereon from and after the death of the life tenant.

"They are entitled further, in the event of refusal or inability to comply with this demand, to maintain an action for damages for such refusal or failure. Until they have made such demand they have not, in our judgment, any cause of action against this corporation."

That, I think, your Honor, will clearly indicate the position of the Court of Appeals on this matter. As we have pleaded, we expect to show that demand was made

on the 10th of June, 1937 in accordance with that opinion. The opinion appears in the Ohio Bar Association Report of April 12, and I will pass it up to the Court.

Mr. Cockley: I shall object to its materiality as evidence in this case when it is offered.

The Court: You may go forward.

Mr. Cockley: Perhaps I should say one thing, and that is this: that when this case is in, I don't know yet quite the theory upon which the plaintiffs are basing this action; but if it appears that they are alleging a cause of action arose under the laws of New York or Massachusetts of a particular kind we hadn't contemplated, why, it may be I will want to amend my answer to allege the statutes of limitations of those states, under a statute which we have in Ohio, as your Honor knows; if there is a shorter period of limitations prevailing in the state where the cause of action arose, that shorter statute will control rather than the Ohio statute.

The Court: This Court is theoretically bound to take notice of the existence, of the fact, of the statutes of limitations in other states. I am just saying that.

Mr. Cockley: If that is true, then there is no demand necessary to file any further answer.

Mr. Vrooman: I wasn't aware of that.

The Court: I might be well enough for you, Mr. Cockley, if you need to amend your answer, to set up the four year statute.

Mr. Cockley: I have set up the four year statute.

The Court: Why don't you amend the answer by saying you, in effect, rely on the four year statute of limitation in Ohio and any other statutes of limitation.

Mr. Cockley: Any other statutes of limitation of other states that may be applicable.

The Court: Because the court is bound to take judicial notice of them.

Mr. Cockley: May it be understood that that language may be inserted in my answer, and I may insert it by proper interlineation?

Mr. Vrooman: Yes.

The Court: I suggest that as a short way.

Mr. Vrooman: For the benefit of your Honor I wish to refer to a case which your Honor decided on this matter of the power of the probate court with respect to order of distribution in the case of *Brown v. Routzahn*, 58 F. (2d) 329, in which your Honor said:

"In Ohio the power of the Probate Court is exhausted in making the order of distribution, and the

court has no authority to determine the persons who will receive the assets or the amount to be paid to each,"

with notation of Ohio cases. That is at page 332.

Your Honor, we have a stipulation which we wish at this time to introduce, containing seven parts. The seventh sets forth the prices of stock on certain dates. We have two more items to be added to that, which we are getting together, but with that exception the stipulation and the exhibits set forth the essential dates and the matters relative to transfer, I believe. That will be Plaintiffs' Exhibit 1.

PLAINTIFFS' WITNESSES.

Thereupon, to maintain the issues on their part, MAURICE J. WEST, one of the plaintiffs, offered himself as a witness, and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Vrooman.

Q. State your name, please. A. Maurice John West.

Q. Where do you reside? A. 1473 Victoria Avenue, Lakewood, Ohio.

Q. What is your profession? A. Lawyer.

Q. How long have you been an attorney? A. Ten years.

Q. Were you born in Cleveland? A. Yes, West Park, Ohio, now a part of Cleveland.

Q. Your father was Charles P. West, Sr.? A. Yes.

Q. When did Mr. West, Sr. die? A. March 21, 1926.

Q. He left a last will and testament, a copy of which has been attached to this stipulation over here? A. Yes, he did.

Q. You are one of the sons remaining? A. That is right.

Q. One of the plaintiffs here? A. Yes.

Q. Were there any other children surviving your father? A. No, my brother is all.

Q. And your brother is Charles Peyton West? A. That is right.

Q. Mr. West, I believe your own mother died prior to your father's death. A. In 1914.

Q. Grace C. West will be referred to in this action, who is she? A. She is my mother's sister, my third cousin.

Q. When was she and your father married? A. In 1919.

Q. After that where did your father and his wife, Grace C. West, live? A. They lived in Cleveland Heights, on Berkshire Road.

Q. Did you live at the family home there, during those years? A. Yes.

Q. Your father died in 1926, is that correct? A. Right.

Q. Do you remember the date? A. I think I have already testified, March 21, 1926.

Q. Under the will, Grace C. West was named the executrix, and did she serve as executrix of that last will and testament? A. Yes.

Q. Are you familiar with the fact that some time in 1929, to wit October 31, 1929, she assigned 92 shares of A. T. & T. stocks, American Telephone and Telegraph Company stock, to Paine-Webber & Company? A. I have learned that through you and through accounts I have investigated myself.

Q. When did you first learn of that? A. I received a letter from the American Telephone and Telegraph Company in the spring of 1934, I think it was April 2, in answer to my inquiry. My brother previously received a letter from my uncle in Boston informing him there was a possibility of this happening, and I got word of that.

Q. Had you ever had any other information prior to that? A. Nothing definite.

Q. Do you know the circumstances under which Grace C. West made that transfer to Paine-Webber & Company, why she did it? A. Why, I understood that she—no, I don't know the circumstances.

Mr. Cockley: Wait a minute, I object to that.

The Court: He says he doesn't know.

The Witness: I don't know the circumstances.

Q. Was she a woman that had business experience prior to that time? A. Yes.

Q. What business experience, if you recall? A. She was connected with W. H. Miner of Chicago, Illinois; she had charge of their billing department. She had been quite successful; built a couple of apartments in Chicago and made considerable money.

Q. How long did you continue to live in this same residence, same home, with Grace C. West, your stepmother? A. The house was sold in February, I believe, 1927. We then moved to an apartment on South Woodland Road.

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My stepmother went to Boston to live in 1928, the fall of 1928.

Q. After your father died, of whom did the family consist? A. My brother and my stepmother were here, and her sister was here, and myself.

Q. What was her sister's name? A. Helen C. Spittler.

Q. Where does she reside now? A. In Boston. Her home has always been in Boston.

Q. When did Grace C. West leave Cleveland? A. In September, 1928.

Q. Now, I want to ask you whether if at any time you agreed to the transfer of that stock by Grace C. West to Paine-Webber & Company or anyone else? A. No, I did not.

Q. Did you know that that stock was transferred to Grace C. West, as an individual, without limitation? A. I did not.

Q. At any time? A. I have never seen stock certificates; I did not know.

Mr. Deibel: You may have the witness.

CROSS EXAMINATION by Mr. Cockley.

Q. Mr. West, when were you born? A. April 22, 1898.

Q. Do you know the birth date of Grace C. West? A. No, I do not.

Q. Do you know her age? A. Approximately.

Q. What is her age? A. At the present time I think she is about 66, and I think her birthday is April 19, though I am not sure.

Q. But you don't know what year? A. No, within a year or two, I don't know the exact date.

Q. Now, you had known her for some time before your father married her in 1919? A. Yes.

Q. As you have said, she is a woman of some successful business experience? A. Yes.

Q. Had she accumulated some estate of her own when she married your father? A. Yes.

Q. And did you from time to time after your father's death and before, consult with her about business matters? A. Oh, we discussed things, all our family affairs.

Q. You had confidence in her judgment, did you, and advice about those things? A. Yes, I listened to it.

Q. Did you know that she occasionally bought and sold securities, before her marriage? A. Yes, she speculated.

Q. She speculated some in the market? A. Yes, all of her life.

Q. And she has been successful at it, up to 1929, or thereabouts? A. She told me she had.

Q. You told me she is living at the present time, I understood you to say, where? A. In Massachusetts, Brookline.

Q. Brookline, Massachusetts? Now, you were admitted to the bar in 1927? A. August 2, 1927.

Q. Then, for about three or four years prior to that you were a student of law in Cleveland? A. Yes, I studied law in Cleveland.

Q. After the death of your father, 1926, you continued to live in the same home with Grace C. West, until September of 1928? A. That is right.

Q. That was for about two years and a half after your father's death, wasn't it? A. Yes.

Q. Now, did this Grace C. West have any attorney representing her or representing the estate? A. No.

Q. There was no attorney? A. No.

Q. Advised her about legal matters in connection with the estate? A. No, she would ask Probate Court clerks, I understand; I don't know.

Q. How is that? A. I say, I think she would ask the Probate Court clerks.

Q. Well, do you know? A. No, not of my own knowledge.

Q. Do you say that during that time she did not consult you in connection with this estate? A. Nothing. She might ask me something but she didn't take anything—that is, she would do what she wanted. Something she didn't understand, she might ask me, and then she did it herself.

Q. You were familiar with the nature of this estate, weren't you, the amount of property in it? A. Yes.

Q. The inventory of the estate showed stocks other than the American Telephone and Telegraph Company stocks? A. Yes.

Q. What other stocks? A. Well, there was some Cleveland Railway Company, M. A. Hanna Company, Ohio Public Service, Butler Brothers, I think there was some Superior Brick that was worthless; that is all I can recall off hand.

Q. Those stocks were listed in the inventory and appraisal at about \$25,000? A. Yes.

Q. And in addition to that, what was in the estate? A. My father had some land contracts, things of that kind, and some houses.

Q. The value of those was appraised at about \$15,000? A. Whatever the records show.

Q. Then there was \$1100 in cash? A. The records show it.

Q. Included in that inventory. Now, in January 1927, you were living at that time with your stepmother? A. Yes, sir.

Q. In the same house? A. Yes.

Q. Mrs. Spittler was also living there, was she not? A. I think she was.

Q. Mr. West, I call your attention to an application for distribution filed in the estate of Charles P. West, of the Probate Court, which is Exhibit 11, attached to Plaintiffs' Exhibit 1. You are familiar with that application, are you not? A. Yes, I am.

Q. You have seen the original of it? A. Yes.

Q. And was the signature attached to the consent on that application, Maurice J. West, your signature? A. Yes.

Q. Do you remember signing it? A. Yes.

Q. Did you read it before you signed it? A. Yes.

Q. And I think you had seen the original signature of your brother, Charles P. West, Jr., that is attached to that? A. Yes.

Q. You had seen it before, the original? A. Yes.

Q. Are you able to say whether that is his signature or not? A. Yes, that is his signature.

Q. You were together when you signed it, do you recall? A. I think we were, on Berkshire Road.

Q. That application for distribution included not only the stock of the American Telephone and Telegraph Company, but all the stocks in the estate, didn't it? A. Yes. It included all, so I understood.

Q. Now, do you say to this Court that you did not know that under that application these stocks would be distributed to Grace C. West?

Mr. Vrooman: I object, your Honor.

The Court: Overruled.

Mr. Vrooman: Objection.

A. No, of course not. I knew they would be transferred to her, but only transferred to her for her natural life. I didn't know they would be transferred to her without limitation.

Q. You knew they would be transferred to her, didn't you, in some form? A. Why, sure.

Q. But your statement is you didn't know they would be transferred to her without limitation, is that it? A. Right.

Q. Do you now know as of what date Grace C. West sent in the necessary papers to the American Telephone and Telegraph Company to have those 92 shares transferred into her name? A. The record shows January 14th, I think, 1927.

Q. Well, I ask you if you knew of your own knowledge when she sent them in? A. Yes, I remember approximately the date, and I know now that is the date.

Q. That is the same date this order was entered? A. I don't know when she mailed it to A. T. & T.

Q. That is what I'm asking you. A. I remember the time of the discussion; when she mailed it to them, I don't know.

Q. The new certificate was issued on February 2nd, by A. T. & T.? A. Yes.

Q. Do you know whether it was three or four days or a week prior to that the papers were sent to them? A. No. We signed it, turned it over to her and she went ahead with it.

Q. Did she show you the paper she sent to the American Telegraph & Telephone Company? A. No.

Q. Did she ask you anything about it? A. At the time we signed the application we understood it was going to be transferred, and that was all there was to it.

Q. Now I want to have marked for identification, Defendant's Exhibit A. There was 52 shares of Cleveland Railway Common stock in your father's estate, wasn't there? A. That is right.

Q. I hand you Defendant's Exhibit A and show you attached to the back of it an irrevocable stock power and call your attention to the signature, M. J. West.

Mr. Vrooman: I object, your Honor. This is immaterial, what was done in connection with the Cleveland Railway Company's stock.

The Court: Well, the Court will hear the testimony.

A. I don't know.

Q. You don't know whether that is your signature or not? A. No.

Q. Well, will you tell the Court whether you do identify that as your signature or refuse to identify it as your signature? A. It looks exactly like my signature. I have no recollection of signing it.

Q. Well, how much like your signature.

The Court: He says exactly. I don't see how you could make it any plainer than that.

Q. Will you now admit it is your signature? A. No.

Q. Well, if I were to present you your signature as attached to the application for probate which you have just admitted was yours, could you point out any difference between that signature and this one? A. No, I can say that signature of Helen C. Spittler isn't her signature.

Q. Helen C. Spittler is a witness? A. Yes.

Q. I am asking you about your signature. A. Well, I say, I have no recollection of signing it.

Q. You say you never did sign it? A. I don't know; maybe I did.

Q. Now, that irrevocable power of attorney that you signed, authorized the transfer of 52 shares of the stock of the Cleveland Railway Company to Grace C. West, doesn't it?

Mr. Vrooman: I object, and the reason I object is because Mr. Cockley has characterized the legal effect of the instrument which he is describing.

Mr. Cockley: Oh, well, it is a simple document, I want to see what he knows about it.

The Court: I think some objection might be made due to the fact that you embody in your question that the witness did sign that document, and he has so far declined to say that he did sign it. If you will omit that characterization of his signature, I will listen to the testimony.

Mr. Cockley: Well we strike that out, then.

The Court: Just withdraw that question.

Mr. Cockley: Yes, withdraw that question.

Q. This irrevocable stock power purports to authorize Grace C. West to transfer 52 shares of stock of the Cleveland Railway Company to her name, does it not? A. It is not an irrevocable stock power. I don't know what it is; it is none such.

Mr. Vrooman: I object.

The Court: It shows what it purports to be on its face, Mr. Cockley, the Court doesn't need any advice on that subject from the witness or anybody else.

Mr. Cockley: I presume not.

Q. Calling your attention to the signature of Charles P. West, Jr., on that Defendant's Exhibit A, I will ask you if that is his signature. A. Looks exactly like his signature. The "H" is a little off, but I would say it looks exactly like his signature. I have no recollection of seeing him sign it.

Q. You say you didn't see him sign it?

The Court: He says he has no recollection of seeing his brother sign it.

Mr. Vrooman: I object. I must inquire of counsel what the purpose of the examination of this Cleveland Railway transfer is.

Mr. Cockley: Well, be patient.

Q. Now, this paper, Defendant's Exhibit A, and the power attached to it is dated January 31, 1927, is it not?

A. Yes.

Q. Do you say to the Court that you did not, you have no recollection at all, of signing that paper? A. Yes.

Q. On or about January 27th? A. Yes.

Mr. Vrooman: Your Honor, what does this question mean; you have or have no recollection?

Mr. Cockley: I said, "you have no recollection of signing it."

Q. You have no recollection of ever discussing the matter with your stepmother, on or about January 31, 1927? A. I have a faint recollection of that thing coming out to the house and my refusal to sign it, but I don't know.

Q. Are you saying that the name M. J. West, here, is a forgery on this paper? A. I really don't know. I may have signed it, and I may not. The signature of Helen C. Spittler does not compare at all with other signatures I have seen of hers, and that makes it questionable in my mind. I am saying frankly and truthfully, I have no recollection of signing it. All I can say is I don't know. I don't know what else I can say.

Q. Is it a fact you say the signature of the witness Helen C. Spittler is not her signature? A. It doesn't look like anything like it.

Q. Which suggests to you it is not your signature. A. It might have been copied.

Q. Is that the thing which calls it to your attention? A. No, I have no recollection of signing it, and certainly when I have no recollection—

Mr. Cockley: It seems to me I have the right to ask the witness for a yes or no answer, whether this is his signature.

The Court: You have the right to ask him. You can ask him again. You have already asked him once or twice.

Mr. Cockley: I know I have asked it; I am not clear he is answering whether that is or is not his signature. He says it looks identical with it.

Q. Are you prepared now to say whether it is your signature or it is not your signature? A. I am prepared to say I don't know.

Q. You would not say it is, or you won't say it is not? Is that right? A. That is right.

Q. You cannot point out any difference between that signature and your other signature which I showed you, which you admit, that is true, is it not? A. Yes.

Q. Now, I would like to have marked for identification as Defendant's Exhibit B this paper, certificate of stock of the M. A. Hanna Company, preferred stock in the M. A. Hanna Company. Mr. West, I want to show you what purports to be a signature "M. J. West" on the back of that under date of January 31st, 1927, and ask you if you can identify that signature as your signature. A. It looks exactly like my signature.

Q. Would your answers as to this signature be precisely the same as to the signature I showed you on Defendant's Exhibit A? A. Not exactly. All I can say as to that, I have no recollection of signing it. There is no question about the document. I don't know any reason why I would not have signed it, perhaps, but the other one is questionable. I have no recollection of signing it.

Q. Is it, or is it not, your signature? A. My dear man, I cannot tell you.

Q. You won't say it is and you won't say it is not. A. That is right.

Q. What about the signature of your brother, Charles P. West, Jr., on that? A. It looks exactly like his signature, but I have no recollection of seeing him sign it.

Q. What about the signature of Helen C. Spittler, as a witness? A. May I see that?

Q. Certainly. A. (After examining same) That looks more like her signature. I wouldn't question that signature.

Q. But you have no recollection at all of signing it? A. No.

Mr. Cockley: I ask that certificate of stock in the M. A. Hanna Company, preferred stock No. C04491 be marked as Defendant's Exhibit C. (So marked.)

Q. Mr. West, did you ever see that stock certificate before, of which that is a copy, photostatic copy? A. No, I never saw this.

Q. Turn it over and look at the back of it. A. I see the back of it, you ask me to turn it over and look at the back of it.

Q. I asked you if you ever saw it before, or had it in your possession? A. Not that I know of.

Q. It purports to assign 16 shares of Cleveland Railway stock to M. J. West and 16 shares to Charles P. West, signed by Grace C. West. Didn't she deliver this to you? A. No, she brought the 16 share certificates.

Q. She had them transferred to your name and gave you each the 16 share certificates? A. That is right.

Q. About when did that occur? A. About the time she went away, September, 1928.

Q. Was it a gift of Mrs. West to you and your brother? A. I wouldn't call it a gift, the stock wasn't paying any dividends. She said it was no use to her. She suggested she would turn it over to us, and we said okeh.

Q. Did you pay her anything for it? A. No.

Q. It was a gift? A. I don't know. My brother and I always thought the stock belonged to us. Maybe I am wrong.

The Court: What stock was this?

Mr. Cockley: This was the 32 shares of preferred stock in the M. A. Hanna Company.

The Court: I thought it was Cleveland Railway stock you were referring to. Be sure it gets into the record under its proper designation, that is all.

Mr. Cockley: Defendant's Exhibits B and C are both stock of the Hanna Company and Defendant's Exhibit A are the certificates relating to the Cleveland Railway stock.

Q. Well, you knew at least, Mr. West, when that stock was delivered to you, that your stepmother must have had it in her name in order to make the delivery. A. Really it did occur to me at the time, it seemed strange. Then I thought as long as she delivered it to us and transferred it to us, there was nothing to it.

Q. You didn't think about it? A. It passed through my mind a little bit, whether she could do that, yes, but when she transferred it to the two of us, I thought it would be all right.

Q. When that passed through your mind what inquiry did you make of her about the American Telephone and Telegraph stock? A. I didn't make any inquiry about anything; just put it in my mind.

Q. You lived with your mother, as you testified between February 2, 1927, when the A. T. & T. stock was transferred into her name, until September, 1928, continuously, you lived in the same house? A. Yes.

Q. Now, during all that time, what inquiry did you make from her about the A. T. & T. stock, in whose name it stood, or whether she still had it? A. Why, she told us she transferred it. At the time that transfer was made I stressed the point she should transfer it in some way it would be earmarked, although I supposed she did; she didn't say anything about it.

Q. You didn't testify about that discussion in the trial in the Common Pleas Court. A. I think there was some discussion.

Q. What inquiry did you make of her as to whether that stock was transferred to her outright or to her for life? A. I didn't make any.

Q. Did you ask to see the certificates? A. I did not.

Q. Did you ever hear about the certificates of the American Telephone & Telegraph stock, from 1927 to 1934? A. Yes.

Q. When? A. In 1930.

Q. Tell us about it, where were you? A. I was married and went on my honeymoon, went down to Boston. After I was there a while, my sister-in-law, or rather my aunt, Helen Spittler, mentioned to me about that Grace had suffered great losses in the stock market, and she thought some of our securities were gone, and so while I was there I asked Grace about it and I demanded to see the certificates and she refused to show them to me.

Q. What did you do about it after she refused to show them to you? A. I was a guest in her home, I didn't say anything more about it, until shortly after I left, I investigated.

Q. In 1930 you investigated? A. Yes.

Q. Did you write the American Telephone & Telegraph Company a letter at that time? A. No, I went to the Cleveland Electric Illuminating Company.

Q. You didn't go there to investigate the transfer of A. T. & T. stock? A. I went there to investigate the standing of the estate. How did I know anything about the securities?

Q. Just answer the question. You didn't go there to examine the title to the stock of the American Telephone & Telegraph Company? A. Certainly not.

Q. In March of 1934, you did write a letter to the American Telephone & Telegraph Company and they wrote you promptly telling you the stock had been transferred out of her name in November, 1929, didn't they? A. That is right.

Q. I ask this letter be marked Defendant's Exhibit D. I hand you what has been marked Defendant's Exhibit D,

and ask you if that is the letter you received from the assistant treasurer of the American Telephone & Telegraph Company in 1934? A. Yes.

Q. But in 1930, when you learned at Boston that Grace C. West had suffered some losses in the market, you didn't write a letter to the American Telephone & Telegraph Company, did you? A. After my inquiry at the Cleveland Electric Illuminating Company, it wasn't necessary; I thought.

Mr. Cockley: I ask that be stricken out and the answer be confined to the question.

The Court: Motion overruled.

Q. Now, will you answer, did you or did you not write to the American Telephone & Telegraph Company? A. No.

Q. Then you didn't go to the Cleveland Electric Illuminating Company to find out anything of the record of the A. T. & T. stock, did you? A. Yes, I went over there to find out if the securities were earmarked.

Q. You say to the Court that the Illuminating Company would know the form in which the American Telephone and Telegraph Company stock had been issued? A. If their certificates were earmarked, I would naturally think the others were—

Mr. Cockley: I think the answer is not responsive to the question.

Mr. Vrooman: I object to inquiring any further.

Q. Now, what other investigation did you make? You have told us now that between 1927 and 1930 you made no inquiry; that in 1930, on your wedding trip, you learned that your stepmother had had some losses and then you made this inquiry of the Electric Illuminating Company. I suppose that was about Electric Illuminating Company stock, wasn't it? A. Right.

Q. Now, tell us any other inquiry you made between 1930 and the date of this letter, and April 4, 1934, respecting the title to this American Telephone & Telegraph Company stock. A. I made no inquiry with respect to the title of American Telephone & Telegraph Company stock.

Q. Did you ever go down and investigate the records of the Common Pleas Court—I mean the Probate Court—in connection with this estate, between 1927 and 1934? A. Why, no, I thought everything was all right, after verifying the record at the Cleveland Electric Illuminating Company; one corporation transferred properly and I thought the others would.

Q. You are so anxious to tell us, what did you find out at the Illuminating Company? A. I found they transferred the stock to Grace C. West, life tenant of the estate of Charles P. West, deceased.

Q. The Electric Illuminating Company did that? A. Yes.

Q. Did you make any other inquiry about any other securities? A. I went over to the Cleveland Railway a couple of times, I wasn't very serious about it. I knew, I felt, rather ashamed of myself.

Q. You went over to the Cleveland Railway Company? A. Yes.

Q. Did you make any other inquiries from anybody else? A. No, I went to the Cleveland Railway Company.

Q. Did you find in what form the Cleveland Railway Company stock was registered in the first instance? A. No. They told me to get proper papers or something. I wasn't interested nor felt it was serious enough to go any further with it. I didn't find out at that time.

Q. You have seen the order of distribution that was made after the application for distribution was filed in this case? A. Yes, I think perhaps I went down there to look at my father's estate. I don't recall, perhaps I did.

Q. When do you say you first saw that order of distribution? A. Oh, I went down there in 1930, and took a look at it.

Q. In 1930 you saw the order of distribution, at that time? A. The application, not the journal entry.

Q. Oh, you didn't see the journal entry, then? A. No.

Q. You were investigating this estate in 1930, weren't you, to find out something about these stocks? A. Yes, I went over to the Cleveland Electric Illuminating Company.

Q. Oh, just a minute. We are talking about the Probate Court. You went down to investigate what the Probate Court records showed about the stock. You now say you saw the application for distribution, but didn't look at the order of distribution? A. I went down there and looked at the file and took a look at the application.

Q. You didn't look at the order for distribution? A. No, the order was in a different book.

Q. When did you first see it? A. I didn't see that order until the spring of 1934, April of 1934, is the first time I saw that journal entry.

Q. You had nothing to do with preparing the application or the order of distribution? A. No, I did not.

Q. Now, there was certain money due on land contracts and other monies in the estate? A. Yes.

Q. Those were all turned over to your mother or to Grace C. West? A. Yes.

Q. She was acting as administrator or executor without bond? A. Yes.

Q. Neither you nor your brother ever made application to require her to put up bond?

Mr. Vrooman: I object. There is no provision in Ohio Law for that proceeding.

The Court: The pleadings clearly make that question competent.

Mr. Vrooman: I ask an exception.

Q. What was the answer? A. No.

Q. You never made any application? A. No..

Q. Never asked to have a trustee for these securities at any time?

Mr. Vrooman: I object.

The Court: Same ruling.

Mr. Vrooman: Exception.

A. No reason for it.

Q. Well, you didn't make any such application?

The Court: The Court will of course take that answer as being a negative reply.

Q. What induced you to make inquiry of the American Telephone & Telegraph Company in 1934, pursuant to which you got the letter marked Defendant's Exhibit D?

Mr. Vrooman: I think that has been covered, your Honor.

Mr. Cockley: The one in 1930 has, not in 1934.

A. I had been visiting my brother in Pittsburgh. He received a letter from my uncle, William Spittler, which he showed to me, to the effect Grace had lost considerable securities and that she was down in Florida, and that our stuff was gone. That was practically positive information.

Q. Then, when you heard of that, you wrote this letter and got this letter telling you the situation as to the A. T. & T. stock? A. I had found out first the Cleveland Railway Company stock and the Ohio Public Service was gone; of course I was going through it thoroughly. I then looked for the A. T. & T.

Q. Then you went to Brookline, Massachusetts, in 1934, to see your stepmother? A. Yes.

Q. What was the purpose of that visit? A. I didn't know where my stepmother was. I went to Brookline to find out where my stepmother was. My purpose was to

show her these facts and demand a return of the assets of the estate.

Q. You found she was in Florida, working? A. Yes.

Q. So you went to Florida? A. Yes.

Q. At your request or solicitation, at least, she then turned over to you some securities, didn't she, for you and your brother? A. She turned them over to us, both of us.

Q. What securities did she turn over to you and your brother? A. She turned over Cleveland Electric Illuminating Company, Ohio Public Service and I got Butler Brothers, in Brookline, Mass.

Q. Butler Brothers? A. That was in Brookline.

Q. That is there was 25 shares of stock of Cleveland Electric Illuminating, was it? A. Yes.

Q. 25 shares of Ohio Public Service Company, preferred, that was turned over to you? A. Yes.

Q. And 15 shares of Butler Brothers, is that right? A. Yes.

Q. How about the Superior Brick Company, preferred and common? A. Oh, I had that before; it was worthless.

Q. Did she turn it over to you at that time? A. Yes.

Q. Does she get the income, since that date, of any of that stock? A. No.

Q. Has been turned over to your brother, has it, completely? A. My brother is sending her an amount of money equivalent to it.

Q. Your brother is? A. Yes, so I understand.

Q. Well, at the time you talked to her in Florida, didn't she tell you at that time that you had consented to this transfer of A. T. & T. stock made in 1927?

(Objection; overruled; exception.)

A. Yes, she said I had consented.

Mr. Cockley: That is all.

Mr. Vrooman: We wish at this time to read into the record the testimony of Charles Peyton West, one of the plaintiffs here, who is unable to attend the trial. It has been stipulated by and between counsel that his testimony in the last trial of this case in the common pleas court of this county may be read as though it were a deposition. We may find we will have to change some exhibit numbers as we go along, in doing that. Mr. Deibel, will you proceed?

(Deposition read by Mr. Deibel as follows):

CHARLES PEYTON WEST, JR., having been first duly sworn, testified as follows:

Q. State your name, please? A. Charles Peyton West, Jr.

Q. Where do you reside? A. 647 Newport Road, Forest Hills, in Pennsylvania.

Q. That is a suburb of Pittsburgh, is it? A. A suburb of Pittsburgh.

Q. By whom are you employed? A. The Westinghouse Electric & Manufacturing Company.

Q. You have been so employed how long? A. For approximately nine years.

Q. I believe you heard your brother testify that within a month or six weeks after your father's death you went to the Westinghouse Company; is that correct? A. I started there the first of May following his death.

Q. After you became employed by the Westinghouse in Pittsburgh, how frequently did you return to Cleveland? A. Through the good weather in the summer I usually came up every other week, and in the winter probably once a month.

Q. And at that time where did you visit in Cleveland? A. At the residence of my stepmother.

Q. And that was on Berkshire Road, was it? A. And subsequently on South Woodland Road.

Q. How long did those visits continue, Mr. West? A. As long as she was in Cleveland.

Q. She left Cleveland when? In 1928? A. I think so.

Q. Now, were you familiar with the nature and extent of your father's estate? A. Yes.

Q. You were familiar with the fact, were you, that Grace C. West was the named executrix under the will and qualified under the will? A. Yes.

Q. And was the matter of distribution discussed with you at the time in January, 1927, when the distribution in kind was made to Grace C. West? A. We talked over the matter.

Q. Were you familiar with the terms of the will, Mr. West? A. I was.

Q. Were you familiar with the fact that there was in the estate 92 shares of stock of the American Telephone & Telegraph Company? A. I was.

Q. And that stock was to be distributed in kind to Grace C. West, was it? A. It was.

Q. What was your understanding with respect to the transfer of the stock to her?

Mr. Cockley: I renew that objection.

The Court: The court will hear the testimony.

Mr. Cockley: Exception.

A. (Answer not read.)

Q. Did you have any talk with Grace C. West at the time the transfer of shares was made, with respect to the manner in which the transfer should be made?

The Court: What stock? Let me get that clear, —the American Telephone & Telegraph stock?

Mr. Vrooman: The American T. & T. stock.

A. Yes.

Q. When was that? A. I cannot name a date. On some of my visits to Cleveland.

Q. Was it before the date of distribution or after it, if you can recall? A. It was probably at that time, though I have no knowledge of being at the preparing of the document.

Q. That is, you had no part in the preparation? A. No.

Q. Did you ever see the stock certificates after the stock was re-issued to Grace C. West? A. No.

Q. Did you have any information as to the manner in which it was issued at any time? A. No.

Q. When were you first informed that the stock had been disposed of? A. Why, I received a letter from my uncle, that is, Mr. Spittler, in which I was—

Mr. Cockley: I object. He has asked the time.

The Court: Can you tell when you first heard of it?

Q. Can you qualify the time? A. That was, I believe, in the fall of 1934. The letter is available.

Q. To refresh your recollection, wasn't it in the spring of 1934? A. I can't name the date definitely, but the letter is available.

Q. Do you have the letter here? A. It is there (indicating).

Q. Did you ever at any time consent to the disposal of the American Telephone & Telegraph Company stock by Grace C. West, life tenant? A. I did not.

Mr. Vrooman: You may have the witness.

Mr. Cockley: I will read it.

CROSS EXAMINATION (Read by Mr. Cockley).

Q. You have lived in Pittsburgh then practically ever since your father's death, Mr. West? A. About that time.

Q. And you returned, you said, on visits bi-monthly during the summer, and probably once a month during bad weather? A. Right.

Q. Always on friendly terms with your stepmother, were you not? A. Always.

Q. I will hand you Plaintiffs' Exhibit 1, Exhibit 11 attached thereto, Mr. West, and ask you if that is your signature appearing, "Charles P. West, Jr.", at the bottom? A. It is.

Q. And where was your signature affixed to this paper? A. I don't remember.

Q. Was it sent to you at Pittsburgh? A. I cannot answer you yes or no. The probabilities were against it because I usually signed such things on my trips to Cleveland.

Q. Well then, you have no independent recollection at this time as to where you were at the time you signed this particular instrument? A. No.

Q. And did you read over the application before you signed it? A. I usually read such things before I sign them.

Q. And did you read the consent before you signed it? A. Well—

Q. The language immediately above your signature? A. Yes, I read that.

Q. Now, this signature purports to have been on the instrument, rather purports to have been executed on the 14th day of January, 1927. Do you know when your signature was affixed to it with reference to that date? A. I couldn't answer that.

Q. Did you see a proposed journal entry or order prepared which was to be signed by the court granting this application? A. I don't remember any such document.

Q. At the time you signed this paper, do you remember any other paper being submitted to you for examination? A. No.

Q. If this paper was signed in Cleveland it was probably signed at the residence of your stepmother and your brother, Maurice? A. I would say so.

Q. So, not knowing where the paper was signed, do you remember there was any discussion preceding your affixing your signature to it? A. The document was undoubtedly read; I can't quote any discussion.

Q. You have no present recollection of any, anyhow? A. That is right, at this time.

Q. Now, will you examine Defendant's Exhibit A and tell us whether you affixed your signature to that paper?

A. As far as I can see, that paper appears to be my signature, but I have no recollection of signing this document.

Q. Were you present during all the time your brother, Maurice, testified on this same subject? A. I was.

Q. Were you in any way guided or influenced in your present answer by anything he said? A. No, I am not. I may have used some of the same words, some of the words that I heard.

Q. Well, you almost gave it parrot-like. A. But the thought is independent.

Q. Do you have any doubt about that being your signature? A. I have the same doubt that he has, because this matter has been discussed previously.

Q. Please answer my question. Do you have any doubt the signature appearing on there is your signature and was put there by you? A. I have a doubt.

Q. You have a doubt it is; you cannot say to the court this is your signature? A. I wouldn't guarantee it.

Q. I don't care about your guarantee; I would like to know whether you are willing to state to the court that this is or is not your signature. A. I am not willing to state.

Q. Either way: you are not willing to state; you are not willing to swear that this is your signature, or you are not willing to swear it is not your signature; is that right? A. Yes.

Q. Now, you have admitted the signature on Plaintiffs' Exhibit 1, Exhibit 11 attached thereto. Will you make comparison between them and tell us if there is any difference between the two signatures, one of which you admit and the other which purports to be yours? A. From all appearances they are the same.

Q. After having examined the instrument which you admit as having your signature, what do you say, whether the signature on the other instrument is or is not yours? A. I repeat my previous statement.

Q. Well, what is it? A. Will the clerk please read the words?

Q. What is the answer? A. Will the clerk have it read?

Q. I would like you to answer it. A. What is the question you propound?

Q. What is your direct answer to that: what do you say as to whether, after having examined both signatures, the one you admit to be yours, whether Defendant's Exhibit A is your signature? A. I cannot say whether it is or is not my signature.

Q. Do you want to stand by that answer when you are under oath? A. I do.

Q. Now, you said you discussed this matter before. Whom did you discuss it with? A. The attorneys and my brother.

Q. Tell us whom you discussed it with.

Mr. Vrooman: Forget that objection.

A. Mr. Vrooman, Mr. Amer, my brother, and Mr. Deibel.

Q. Now, Mr. Deibel, Mr. Amer, and Mr. Vrooman didn't know anything about whether this is your signature or not? A. No.

Q. They weren't able to help you on that subject? A. No.

Q. You didn't discuss it with your brother, did you? A. Yes.

Q. Have you any doubt about the signature of Helen C. Spittler, your aunt, on that instrument? A. I have.

Q. You have some doubt about it? Was that one of the subjects of discussion between you and your brother? A. Yes.

Q. Mrs. Spittler was living with your stepmother and your brother? A. Yes.

Q. Mrs. Spittler was living with your stepmother and your brother at the time this instrument purports to have been signed, was she not? A. Why, she was during that time; she might have been away for short periods.

Q. Well, I say, she was resident there? A. She was resident there.

Q. Living there. There is not any question about that, is there? A. You are right.

Q. Well, do you remember any transaction in connection with the execution of a stock power for the Cleveland Railway Company? A. No.

Q. Do you remember any discussion on that subject at all? A. No.

Q. Never talked that over with your mother at all, your stepmother? A. No.

Q. Now, I will hand you Defendant's Exhibit B, Mr. West, and ask you to examine the signature appearing on this instrument "Charles P. West, Jr." and tell us whether that is your signature. A. I cannot say that it is or that it is not my signature.

Q. You make the same answer respecting Defendant's Exhibit B that you did to Exhibit A? A. (Witness nods.)

Q. Well, how did you identify the signature on Plaintiffs' Exhibit 1, Exhibit 11 attached thereto, then, since both signatures are identical; will you tell the court that?

A. All I can say is that it looks the way I sign my name, and I have no reason to question it.

Q. You didn't answer my question. You have identified that was your signature on Plaintiffs' Exhibit 1, Exhibit 11 attached thereto, and you say you fail to identify your signature on Defendant's Exhibits A and B. Since all those signatures are identical, will you tell us how you identify the one and cannot identify the other two?

A. They appear alike. I have no memory of signing any of the documents. I have reason to question one because of the signature of the witnesses.

Q. I am going to insist on an answer. A. I will make the further statement that on the date of that document, was a normal working day in Pittsburgh; I presumably was at work there.

Q. I am going to ask you the same question over again, and I wish you would listen so we can try to get this question answered and not waste any more time. (Previous question read to witness.) You didn't answer my question. You have identified that it was your signature on Plaintiffs' Exhibit 1, Exhibit 11 attached thereto, and you have failed to identify your signature on Defendant's Exhibits A and B. Since all those signatures are identical, will you tell us how you identify the one and cannot identify the other two? A. I cannot make a statement as to that.

Q. You cannot answer the question. Mr. West, you received 16 shares of the preferred stock of the M. A. Hanna Company from your mother? A. I did.

Q. She transferred that stock in 1928? A. Approximately, yes.

Q. Were you in Pittsburgh at the time that was done? A. Yes.

Q. Were the stock certificates sent to you? A. I don't remember whether it was mailed or handed to me while visiting in Cleveland; I cannot say.

Q. Did you know your mother was going to give it to you before receiving it? A. Yes.

Q. She had discussed that with you? A. Yes.

Q. You didn't do anything about it at all? A. No.

Q. She made the transfer; you got the stock as a gift?

A. As far as I remember.

Q. You knew the stock in the estate was to be distributed in kind, according to the application? A. According to what?

Q. I mean from the fact that the application was filed, you knew the stock of the estate was to be distributed in kind? A. Right.

Q. From the date of the filing of the application, which was the 14th day of January, 1927, up until 1934, did you ever make any inquiry as to how or in what manner the A. T. & T. stock was transferred? A. Between what dates?

Q. The time of the filing of the application, January 14, 1927, up until the spring of 1934, when this lawsuit was filed, did you personally ever make any inquiry about the A. T. & T. stock at all or the manner of its transfer? A. Not by name.

Q. Did you at any time prior to 1934 communicate with the American Telephone & Telegraph Company at any time with reference to this stock, the 92 shares? A. I did not.

Q. You still have that Hanna stock, have you? A. I do.

Mr. Vrooman: May I ask if counsel admits the making of demand?

Mr. Cockley: I admit the A. T. & T. received a letter. I will admit the copy of the letter, if that is what you mean by demand.

Mr. Vrooman: Yes. Your Honor, I will read into the record at this time the demand which was made June 18, 1937. This is a letter signed by Garfield, Cross, Daoust, Baldwin & Vrooman, and Mr. Deibel, as attorneys for Charles P. and Maurice J. West, the original of which was sent to the American Telephone & Telegraph Company at 750 Huron Road, Cleveland, Ohio, copy to Tollés, Hogsett & Ginn, attorneys of record for the defendant. "Gentlemen: Re Charles P. West and Maurice J. West vs. American Telephone & Telegraph Company.

"The Court of Appeals in cause No. 15,504 of the docket of the Eighth Judicial District of Ohio, determined our clients, Charles P. West and Maurice J. West, were entitled to demand of your company the return of certificates for 92 shares of stock, or of other stock of equal par value, and that until they made such demand, no cause of action arose against your company. Our clients, Charles P. West and Maurice J. West, hereby demand that you issue within ten days from the date hereof in their joint names and deliver to them a certificate for 92 shares of capital stock of the American Telephone & Telegraph Company, wrongfully transferred by you to a third party on November 2, 1929, and at the same time pay and deliver to them a sum equivalent to the aggregate cash dividends on 92 shares of said capital stock paid since

November 2, 1929, with interest at 6% on said dividends from the times of such payments; that you pay and deliver to them the difference between the value of said stock at the time of this demand and the highest intermediate market value on the date of said wrongful transfer with interest on the latter sum at 6% from the date of this demand; and you preserve on behalf of or restore unto said clients any rights, privileges or immunities of which they have been deprived by said wrongful transfer.

"Our said clients, without waiving any rights of damages or in any way limiting the extent or amount of any action, or right of action or right of recovery which they may now or hereafter have of you by reason of said wrongful transfer, further demand you restore to them whatever rights they may have heretofore have had, may now have, or may hereafter have by reason of said wrongful transfer.

"A copy of this letter is being mailed to Tolles, Hogsett & Ginn, your counsel in the above referred to action.

"Very truly yours," signed as above indicated.

Mr. Cockley: How is that signed?

Mr. Vrooman: By Garfield, Cross, Daoust, Baldwin & Vrooman, and Harold Deibel, attorneys for Charles P. West and Maurice J. West.

Mr. Cockley: Now, the defendant will concede that the original of that letter was received by the American Telephone & Telegraph Company in the ordinary course of the mails following the date on which it was sent, and that a copy was also furnished to counsel on or about the same date.

Mr. Vrooman: Mr. Cockley, is it stipulated that the dividends during the period in question, that is, from the date of the transfer until the present time, have remained at \$9 per share per annum?

Mr. Cockley: Well, I think that is the fact, but I want to check. I would be glad to stipulate whatever it is, subject to correction. I think it has been that since some time in 1920.

The Court: Do you know the dividend at that time?

Mr. Cockley: I do not.

Mr. Vrooman: May we stipulate and file subsequently the amount of the dividend and the date of dividend?

Mr. Cockley: Yes, surely.

Mr. Vrooman: Now, your Honor, counsel have also agreed that counsel may, after the filing of briefs and oral argument, if the court care for it, file with the court their references to the law of Massachusetts and New York, both the statutory law and the cases which they claim to be relevant, and that the court may in its findings of fact and conclusions of law determine the fact as to the laws of those two states and its conclusions as to the laws of those states, if applicable, and whether applicable. Is that correctly stated?

Mr. Cockley: Substantially so, I think.

Mr. Vrooman: Now, I wish to offer formally as Plaintiffs' Exhibit 1, and the Law Reporter I believe should be marked Plaintiffs' Exhibit 2, which sets forth the opinion of the Court of Appeals of the Eighth Judicial District.

Mr. Cockley: I have no objection to 1. I object to 2 on the ground that you cannot modify the judgment of the court by reason of the opinion. It is signed, and the judgment is perfectly clear.

The Court: The court will receive the item of evidence over your objection.

Mr. Vrooman: I believe, Mr. Cockley, your answer admits the refusal of the demand. In case it does not, will you stipulate that the demand of June 18 or the request in the letter, was refused?

Mr. Cockley: No. I stipulate that we never answered the letter.

Mr. Vrooman: Well, you did answer it.

Mr. Cockley: Oh, did I? Well, I will stipulate in accordance with this letter we acknowledge receipt of your demand upon the American Telephone & Telegraph Company, receipt of copy of your demand upon the American Telephone & Telegraph Company, on June 21, 1937. There is no doubt about the fact that we have never paid any attention to their demand, if it was a demand.

Mr. Vrooman: One more thing and I will be through. I would like to have Mr. Maurice J. West resume the stand for a moment.

MAURICE J. WEST thereupon resumed the stand and further testified as follows:

DIRECT EXAMINATION by Mr. Vrooman.

Q. Mr. West, you are familiar with Helen C. Spittler's signature, are you? A. I am.

Q. Can you identify it? A. Yes.

Q. I will ask you whether or not this series of five checks which we are about to hand you and which will be marked Plaintiffs' Exhibit 3, do in fact bear the signature of Helen C. Spittler as indorsement thereon.

The Court: The genuine signature?

A. Yes, I would say this is her signature.

Mr. Cockley: I want to object to this in its entirety; expecting to compare this signature with one on another paper, and say that it is not. It doesn't make a bit of difference whether Helen C. Spittler's signature is on the paper I introduced; the question is whether he signed it, not whether she signed it.

The Court: The court will receive the item of evidence.

Any cross examination?

CROSS EXAMINATION by Mr. Cockley.

Q. May I see those a moment? Well, Helen C. Spittler's name appears twice on each of those indorsements?

A. Whatever it does there. I can look at it and see.

Q. I ask you to look at that signature. Is that Helen C. Spittler's? A. No, that is Grace C. West's. She indorses: "Please pay to Helen C. Spittler."

Q. So the second signature, that is Helen C. Spittler's? A. Yes, the second signature.

Q. Did she always make her signature exactly that way, do you know; always the same way? A. That is her signature as I recall it. I don't recollect any other signature.

Mr. Cockley: That is all.

Mr. Vrooman: Plaintiffs rest.

The Court: We will take no more testimony this morning. Adjourn court until 1:30.

(At 1:30 p.m. the trial was resumed.)

The Court: You may proceed, Mr. Cockley, with the defense.

Mr. Cockley: I would like to stipulate first, that Charles P. West, Jr., was born July 10, 1896. Is that agreeable to you?

Mr. Vrooman: Yes.

Mr. Cockley: I offer in evidence Defendant's Exhibit A, being photostatic copy of a certificate of stock 47607 of The Cleveland Railway Company, payable to the order—

The Court: That can all be put in without any specific reference to that. They have all been testified to and used in evidence.

Mr. Cockley: Then I offer in evidence Defendant's Exhibit A.

I offer Defendant's Exhibit B, Defendant's Exhibit C, Defendant's Exhibit D. I offer in evidence the photostatic copy of the inventory of the estate of Charles P. West as filed in the Probate Court, marked Defendant's Exhibit E. I offer Defendant's Exhibit F, being the petition in the case of Charles P. West *et al.* v. The American Telephone & Telegraph Company in the Common Pleas Court.

I offer Defendant's Exhibit G, being the amended answer in the same case in the Common Pleas Court.

I offer Defendant's Exhibit H, being a reply to the amended answer in the same case.

I offer Defendant's Exhibit I, being a stipulation that has been entered into between counsel for the plaintiffs and defendant. May I state, for the information of the court, that this stipulation recites the filing of the former suit in the Common Pleas Court, and it was tried there upon the merits, and judgment rendered in favor of the plaintiffs, subsequently reviewed in error in the Court of Appeals, and disposed of, being remanded to the Court of Common Pleas; that the opinion of the Court of Appeals—there is no opinion of the Court of Appeals filed with the record in that case, but the copy of said opinion furnished by the court to counsel of record. That thereafter proceedings were had to procure motion to certify in the Supreme Court of Ohio, and that was denied. That is the substance of that stipulation, and I offer the stipulation as Defendant's Exhibit I.

Defendant's Exhibit J is offered in evidence, and this is the mandate of the Court of Appeals as it now appears on the Common Pleas docket of Cuyahoga County.

The Court: These items of evidence are all received.

(Oral argument had.)

The Court: Counsel may have until the 15th of January to file briefs. The case is submitted.

PLAINTIFFS' EXHIBIT 1.**Stipulation of Parties With Exhibits Attached.**

(Filed December 17, 1937.)

[Caption Omitted.]

It is hereby stipulated between counsel for the respective parties that the following facts are true; that the documents hereto attached are true and correct copies of the instruments of which they purport to be copies; that either party may offer this stipulation or any part of it or any of the documents hereto attached without further or other proof, subject to any objections that the other party may make on the ground of relevancy or materiality.

1. Charles P. West, domiciled for many years in Cuyahoga County, died March 21, 1926. His Last Will and Testament, dated February 15, 1924, was probated in Cuyahoga County, a true copy thereof being hereto attached, marked Exhibit 10.

2. At the date of the death of Charles P. West, he was the owner of 92 shares of common stock of American Telephone & Telegraph Company, to evidence which ownership he held the following certificates duly executed by said Company, to-wit,

<u>Certificate No.</u>	<u>Date Issued</u>	<u>No. of Shares</u>
R 38483	February 17, 1920	9
T 18131	May 17, 1921	18
V 57527	July 20, 1921	5
T 60328	September 22, 1921	20
T 76112	November 18, 1921	5
N 37022	November 1, 1922	11
NJ 3878	November 26, 1923	9
N 82973	August 1, 1924	15
		<hr/> 92

3. On or about February 2, 1927, there was delivered to the American Telephone & Telegraph Company on behalf of Grace C. West at its transfer office in New York City the above-described certificates for 92 shares of its common stock, each of which contained an assignment on the back thereof to Grace C. West, signed "Charles P. West, Grace C. West exec., C. P. West estate." These assignments were duly witnessed and the signature thereon guaranteed by The Cleveland Trust Company. A true and photostatic copy of each of said certificates, together with the assignments endorsed on the back thereof, is hereto

attached, marked respectively Exhibits 1, 2, 3, 4, 5, 6, 7, and 8.

4. At or about the same time that the above certificates were delivered to the American Telephone & Telegraph Company at its said transfer office, there were also delivered to it copies of the following documents, certified by the Judge of the Probate Court of Cuyahoga County, Ohio, and under the seal of said Court, to be full and true copies from the original papers on file and of record in said Court.

(a) Certificate of appointment of Grace C. West as Executrix of the estate of Charles P. West, deceased, a true copy of which is hereto attached, marked Exhibit 9.

(b) Last Will and Testament of Charles P. West, dated February 15, 1924, a true copy of which is attached hereto, marked Exhibit 10.

(c) Application of Grace C. West as Executrix of the estate of Charles P. West for distribution in kind of the stocks and other property held by her as Executrix, dated January 14, 1927, a true copy of which is attached hereto marked Exhibit 11.

(d) Journal Entry of the Probate Court of Cuyahoga County, Ohio, granting said application and ordering distribution in kind, a true copy of which is hereto attached, marked Exhibit 12.

5. Upon receipt of the assigned certificates for 92 shares hereinbefore described, together with the other documents hereinbefore listed, the American Telephone & Telegraph Company on February 2, 1927, issued a new certificate No. NQ 58089 to Grace C. West for 92 shares of the common stock of said Company and delivered the same by mail to Grace C. West. On or about October 31, 1929, said certificate No. NQ 58089 was delivered by said Grace C. West to the office of Paine, Webber & Company, brokers, at Boston, Massachusetts, as collateral for her individual account there, together with an assignment and power of attorney to transfer duly executed to Paine, Webber & Company by said Grace C. West. On or about November 2, 1929, the New York office of Paine, Webber & Company, having received said certificate and assignment from its Boston office, delivered said certificate with the said assignment and power of attorney to the American Telephone & Telegraph Company, and on or about November 4, 1929, the defendant issued a new certificate for said 92 shares to or upon the order of said Paine, Webber & Company. A true and photostatic copy of said certificate No. NQ 58089, together with the assignment and transfer

of her interest therein by Grace C. West is hereto attached, marked Exhibit 13.

6. Along with the assignment of the 92 shares of stock of the defendant represented by said certificate No. NQ 58089 on November 4, 1929, said Grace C. West also assigned in like manner an additional 58 shares of stock of defendant, making an assignment of 150 shares, and which were all transferred on November 4, 1929, from Grace C. West to Paine, Webber & Company, and which were held by said Paine, Webber & Company at its New York office as collateral for Grace C. West's individual stock account at said Paine, Webber & Company until September 24, 1930, at which time said Paine, Webber & Company sold 50 of said shares at \$208.00 per share, and 100 of said shares at \$208.25 per share on the New Stock Exchange and applied the proceeds of said sales on said individual account of said Grace C. West. Neither Paine, Webber & Company nor the subsequent purchaser knew of any limitation upon the right of Grace C. West to sell the entire interest in said shares.

7. The high, low and last sales of shares of the common stock of the American Telephone & Telegraph Company were as follows on the dates next given:

	<u>Date</u>	<u>High</u>	<u>Low</u>	<u>Close</u>
February	2, 1927	153 $\frac{3}{4}$	153 $\frac{3}{8}$	153 $\frac{5}{8}$
October	31, 1929	250	240 $\frac{1}{2}$	246 $\frac{3}{4}$
November	4, 1929	248 $\frac{1}{4}$	233	237
September	24, 1930	211 $\frac{3}{4}$	207 $\frac{3}{8}$	209
June	18, 1937	165	164 $\frac{1}{4}$	165
December	16, 1937	147 $\frac{1}{4}$	145 $\frac{3}{4}$	146

The highest intermediate value between November 4, 1929, and May 4, 1934, both inclusive, was \$274.25 on April 14, 1930.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,

Attorneys for Plaintiffs.

WILLIAM B. COCKLEY,

Attorney for Defendant.

PRINTER'S NOTE:

In all of those Stipulation Exhibits following which are copies of Stock Certificates, the omission of names from the signature lines of the Bankers Trust Company, Registrar, or the omission of the name of the Transfer Clerk of Defendant, signifies that such names were undecipherable.

EXHIBIT 1

2-2-27

No. R38483
—9 Shares

Countersigned
AMERICAN TELEPHONE & TELEGRAPH COMPANY
By
(Corporate Seal)
Transfer Clerk.

Units (1)(2)(3)(4)(5)(6)(7)(8)(9)(0)
Tens (1)(2)(3)(4)(5)(6)(7)(8)(9)(0)

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Nine Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 17th day of Feb., 1920.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

W. J. STOUT,
Assistant Treasurer.

JAMES ROBB,
Vice President.

(Perforated mark) Canceled 2-2-27 A T & T Co
(Perforated mark) Canceled 2-3-27 B T Co

(Assignment on Back)

82393

For Value received, hereby sell, assign and transfer unto (Mrs.) Grace C. West, 3134 Berkshire Road, Cleveland Heights, Ohio, all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, 19....

In Presence of
GRACE C. WEST,
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed

THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, Vice Pres.
By C. W. STANSBURY, Vice Pres.

WPC

For Tax Stamps See CTF. No. NJ3878

Certificate for Less
Than One Hundred Shares
Registered
BANKERS TRUST COMPANY
Registrar

Assistant Secretary.

By

PAGES : 50, 52, 54,

56, 58, 60, 62, 64.

ARE BLANK

Certificate for Less
Than One Hundred Shares
Registered May 17 1921
BANKERS TRUST COMPANY Registrar

By Assistant Secretary.

No. T18131
—18— Shares

2-2-27
No. T18131
—18— Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100 EACH

THIS IS TO CERTIFY that Chas. P. West is the owner of Eighteen Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 17th day of May, 1921.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

H. D. DUNLAP,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(Perforated mark) Canceled 2-2-27 A T & T Co
(Perforated mark) Canceled 2-3-27 B T Co

Countersigned
By
(Corporate Seal)
Transfer Clerk.
AMERICAN TELEPHONE & TELEGRAPH COMPANY

Units (1)(2)(3)(4)(5)(6)(7)(8)(9)(0)
Tens () (2)(3)(4)(5)(6)(7)(8)(9)(0)

(Assignment, on Back)

For Value received hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, 19....

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed

THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, Vice Pres.
By C. W. STANSBURY, Vice Pres.

WJC

For Tax Stamps See CTF No. NJ 3878

Certificate for Less
Than One Hundred Shares

Registered Jul 20 1921

BANKERS TRUST COMPANY Registrar

By Assistant Secretary

No. V57527
5 Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Five Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 20th day of July, 1921.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

E. C. McALLISTER,

Assistant Treasurer.

T. D. BOWEN,

Vice President.

(Perforated mark) Canceled 2-2-27 A T & T Co

(Perforated mark) Canceled 2-3-27 B T Co

(Assignment on Back)

For Value received, hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, 19....

In Presence of

P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed

THE CLEVELAND TRUST COMPANY

By E. S. CURTISS, Vice Pres.

By C. W. STANSBURY, Vice Pres.

WJC

For Tax Stamps See CTF No. NJ 3878

2-2-27

No. V57527
5 Shares

By C. A. STOCKBRIDGE,
AMERICAN TELEPHONE & TELEGRAPH COMPANY
Transfer Clerk.

Countersigned

Units (1)(2)(3)(4)() (6)(7)(8)(9)(0)
Tens (1)(2)(3)(4)(5)(6)(7)(8)(9)()

82393

EXHIBIT 4

Certificate for Less
Than One Hundred Shares

Registered
BANKERS TRUST COMPANY Registrar

By Assistant Secretary.

No. T60328
20 Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100. EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Twenty Shares of the Capital stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 22nd day of Sept., 1921.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

H. D. DUNLAP,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(Perforated mark) Canceled 2-2-27 A T & T Co
(Perforated mark) Canceled 2-3-27 B T Co

Countersigned
By
(Corporate Seal)
Transfer Clerk.
AMERICAN TELEPHONE & TELEGRAPH COMPANY

Units (1)(2)(3)(4)(5)(6)(7)(8)(9)()
Tens (1)() (3)(4)(5)(6)(7)(8)(9)(0)

(Assignment on Back)

82393

For Value received, . . . hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, 19....

In Presence of
P. S. WILSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed

THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, Vice Pres.
By C. W. STANSBURY, Vice Pres.

WJC

For Tax Stamps See CTF No. NJ 3878

EXHIBIT 5

Certificate for Less
Than One Hundred Shares

Registered Nov 18 1921

BANKERS TRUST COMPANY

Registrar

By

Assistant Secretary

No. T76112
5 Shares

2-2-27
No. T76112
5 Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Five Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 18th day of Nov., 1921.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

H. D. DUNLAP,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(Perforated mark) Canceled 2-2-27 A T & T Co
(Perforated mark) Canceled 2-3-27 B T Co

(Corporate Seal)

Transfer Clerk

Countersigned
By
AMERICAN TELEPHONE & TELEGRAPH COMPANY

Units (1)(2)(3)(4)(5)(6)(7)(8)(9)(0)
Tens (1)(2)(3)(4)(5)(6)(7)(8)(9)(0)

(Assignment on Back)

82393

For Value received, hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, 19

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed

THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, Vice Pres.
By C. W. STANSBURY, Vice Pres.

WJC

For Tax Stamps See CTF No. NJ 3878

EXHIBIT 6

No. N37022
11 Shares

2-2-27
No. N37022
11 Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Eleven Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 1st day of November, 1922.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

E. C. McALLISTER,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(Perforated mark) Canceled 2-2-27 A T & T Co
(Perforated mark) Canceled 2-3-27 B T Co

Countersigned

By C. A. STOCKBRIDGE,
(Corporate Seal) Transfer Clerk.

Units () (2) (3) (4) (5) (6) (7) (8) (9) (0)
Tens () (2) (3) (4) (5) (6) (7) (8) (9) (0)

Certificate for Less
Than One Hundred Shares

Registered Nov 1 1922

BANKERS TRUST COMPANY Registrar

By Assistant Secretary.

(Assignment on Back)

82393

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The signature should be guaranteed by an incorporated bank or trust company, or by a New York, Boston, Philadelphia, Chicago or Washington stock exchange member or firm, whose signature is known to the transfer office, or witnessed by a responsible person whose signature is so known. Where it is impracticable to secure such guarantee or witness, the signature should be acknowledged formally before a notary public under his seal.

For Value received, . . . hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, 19.

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

Signature Guaranteed

THE CLEVELAND TRUST COMPANY

By E. S. CURTISS, Vice Pres.

By C. W. STANSBURY, Vice Pres.

WIC

For Tax Stamp See CTE No. NJ 3878

EXHIBIT 7

2-2-27
No. NJ3878
9 Shares

(Corporate Seal)
By

Transfer Clerk.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

Countersigned

No. NJ3878
9 Shares

Assistant Secretary.

Registrar

BANKERS TRUST COMPANY

Registered

By

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Nine Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 26th day of November, 1923.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

E. C. McALLISTER,

Assistant Treasurer.

T. D. BOWEN,

Vice President.

(Perforated mark) Canceled 2-2-27 A T & T Co

(Perforated mark) Canceled 2-3-27 B T Co

(Assignment on Back)

82393

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The signature should be guaranteed by an incorporated bank or trust company, or by a New York, Boston, Philadelphia, Chicago or Washington stock exchange member or firm, whose signature is known to the transfer office, or witnessed by a responsible person whose signature is so known. Where it is impracticable to secure such guarantee or witness, the signature should be acknowledged formally before a notary public under his seal.

For Value received, hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, 19....

In Presence of

P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

Signature Guaranteed

THE CLEVELAND TRUST COMPANY

By E. S. CURTISS, Vice Pres.

By C. W. STANSBURY, Vice Pres.

Certificate for Less
Than One Hundred Shares

Registered Aug 1 1924

BANKERS TRUST COMPANY Registrar

By

Assistant Secretary.

No. N82973
##15## Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Fifteen Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 1st day of August, 1924.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

E. C. McALLISTER,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(Perforated mark) Canceled 2-2-27 A T & T Co
(Perforated mark) Canceled 2-3-27 B T Co

(Assignment on Back)

82393

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The signature should be guaranteed by an incorporated bank or trust company, or by a New York, Boston, Philadelphia, Chicago or Washington stock exchange member or firm, whose signature is known to the transfer office, or witnessed by a responsible person whose signature is so known. Where it is impracticable to secure such guarantee or witness, the signature should be acknowledged formally before a notary public under his seal.

For Value received, hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated 19....

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

Signature Guaranteed
THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, Vice Pres.
By C. W. STANSBURY, Vice Pres.

2-2-27

No. N82973
##15## Shares

(Corporate Seal)

By C. B. SMALL,

Transfer Clerk.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

Countersigned

Units (1)(2)(3)(4)(5)(6)(7)(8)(9)(0)
Tens () (2)(3)(4)(5)(6)(7)(8)(9)(0)

154617

EXHIBIT 9

IN THE PROBATE COURT.

THE STATE OF OHIO,
CUYAHOGA COUNTY, SS.

I, NELSON J. BREWER, Judge of the Probate Court within and for said County, in the State aforesaid, do hereby certify and make known, that on the 5th day of April, one thousand nine hundred and twenty-six, Letters Testamentary on the Estate of Charles P. West, deceased, were granted unto Grace C. West, and the same are now in full force and effect.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Probate Court, at Cleveland, in said County, this 23rd day of September, 1935.

NELSON J. BREWER,
Probate Judge,

(Seal)

By FRANK ZIGELMAN,
Deputy Clerk.

EXHIBIT 10

LAST WILL AND TESTAMENT.

I, Charles P. West, of the City of Cleveland Heights, Cuyahoga County and State of Ohio, being of sound mind and disposing memory, do make and publish this my last will and testament, hereby revoking all former wills by me heretofore made.

Item I. I direct that all my just debts and funeral expenses be paid out of my estate as soon after my decease as may be found convenient.

Item II. I give, devise and bequeath to my beloved wife Grace C. West, in lieu of her dower and year's support, the use, income, rents and profits of all of my property of every kind and nature and wheresoever the same may be located, for and during her natural life, to use, enjoy and dispose of the same as she may deem best.

I hereby give to my said wife authority, with the consent and advice of my two sons hereinafter named, without the intervention of the probate court, to convert any or all of my real estate or securities into money and to invest and reinvest the same and any other moneys I may have at the time of my decease, in such manner as she and my said sons may determine.

Item III. After the decease of my said wife, I direct that all of my said property be divided equally between my two sons Charles Peyton West and Maurice John West, share and share alike, or their heirs, per stirpes, or in case of the death of either without leaving lawful heirs of his body, then all of said property shall go to the survivor of them.

I nominate and request the probate court to appoint my said wife Grace C. West, to be executrix of this my last will and testament, or in case of her death or refusal to act, I request the probate court to appoint my two sons above mentioned as co-executors, in her stead, and request that neither she nor they be required to give bond or to file any account with the probate court.

In case it shall become necessary to sell any of my real estate or personal property to pay the debts of my estate, I hereby give my said executrix or executors full authority so to do without the intervention of the probate court.

IN TESTIMONY WHEREOF I have herunto set my hand to this my last Will and Testament this 15th day of February A. D. 1924.

CHARLES P. WEST.

Signed by the said Charles P. West as his last will and testament in our presence and by us signed as witnesses thereto at his request and in his presence and in the presence of each other this 15th day of February A. D. 1924.

STEPHEN H. PARKER resides at 981 Ansel Rd., Cleve. O.
A. W. BARBER resides at 1503 Warren Rd., Lakewood.

EXHIBIT 11

Doc. 191 No. 154617

In re estate of Charles P. West, Deceased.

State of Ohio } ss. IN PROBATE COURT.
County of Cuyahoga }

APPLICATION FOR DISTRIBUTION IN KIND.

Now comes Grace C. West, the duly appointed and qualified executrix of the estate of Charles P. West, deceased, and states to the Court that all of the debts of said estate have been fully paid.

Your applicant further says that among the assets of said estate are:

Stipulation Exhibit 12

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		Certificate	52152	Shares	3	Total
Cleveland Railway Co. (Capital Stock)		"	51435	"	6	
		"	50475	"	7	
		"	50297	"	5	
		"	47607	"	24	
		"	48537	"	3	
		"	51036	"	4	52
Cleveland Electric Illuminating Co., Preferred		"	GR 1222	"	10	
		"	508	"	15	25
Ohio Public Service Co. Pref.		"	OO 7260	"	10	
		"	O 12119	"	15	25
American Telephone & Telegraph Co. (Capital Stock)		"	18131	"	18	
		"	37022	"	11	
		"	T 76112	"	5	
		"	D 57527	"	5	
		"	6328	"	20	
		"	NJ 3878	"	9	
		"	N 82973	"	15	
		"	R 38483	"	9	92
M. A. Hanna Co. Preferred		"	OO 3226	"	32	32
Butler Bros. (Capital)		"	D-22620	"	15	15
Superior Brick Co. Pref.		"	164	"	10	10
Superior Brick Co. Common		"	177	"	10	10

Your applicant further says that by the terms of the last will and testament that all said stocks are bequeathed to her for and during her natural life.

Your applicant therefore asks the court to transfer said stocks to her, the within named Grace C. West.

GRACE C. WEST.

Sworn to and subscribed before me this 14th day of Jan. A. D. 1927.

A. F. KOTOWSKI, *Deputy Clerk.*

We the undersigned, Charles P. West, Jr., and Maurice J. West, hereby consent to the foregoing distribution in kind.

CHARLES P. WEST JR.

MAURICE J. WEST.

(Filed Jan. 14, 1927.)

EXHIBIT 12

ORDER OF DISTRIBUTION IN KIND.

(Probate Court Caption omitted.)

On this 14th day of January, 1927, this cause came on to be heard on the application of Grace C. West, the duly appointed and qualified executrix of the estate of Charles P. West, deceased, for an order of this Court authorizing

her to distribute certain assets belonging to the estate of said decedent, in kind.

Whereupon, the Court, being fully advised in the premises, finds that all the debts of said decedent have been fully paid, and that there are now no claims outstanding against said estate. The Court further finds that among the assets belonging to said decedent's estate still in the possession of said executrix, are the following stocks, to wit:

Cleveland Railway Co. (Capital Stock)	Certificate	52152	Shares	3.	Total
	"	51435	"	6	
	"	50475	"	7	
	"	50297	"	5	
	"	47607	"	24	
	"	48537	"	3	
	"	51036	"	4	52
Cleveland Electric Illuminating Company, Preferred	}	GR 12224	"	10	
		508	"	15	25
Ohio Public Service Co. Pref.	"	OO 7260	"	10	
		O 12119	"	15	25
American Telephone & Telegraph Co. (Capital Stock)	}	18131	"	18	
		37022	"	11	
		T 76112	"	5	
		D 57527	"	5	
		6328	"	20	
		NJ 3878	"	9	
		N 82973	"	15	
		R 38483	"	9	92
M. A. Hanna Co. Preferred	"	OO 3226	"	32	32
Butler Bros. (Capital)	"	D-22620	"	15	15
Superior Brick Co. Pref.	"	164	"	10	10
Superior Brick Co. Common	"	177	"	10	10

The Court further finds that by virtue of the terms of the last will and testament of the said Charles P. West, deceased, all of said stocks are bequeathed to Grace C. West, his widow, for and during her natural lifetime, and that she is desirous of having the said stocks distributed unto herself in kind. The Court further finds that all of the next of kin of said decedent have duly consented in writing to such distribution.

Wherefore said application is granted, and it is by the Court ordered that said applicant, Grace C. West, be and she is hereby authorized and directed to distribute in kind and transfer unto herself as the widow of said Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks, as prayed for. Jour. 272 page 424.

(Probate Record Duly Certified.)

Certificate for Less
Than One Hundred Shares

Registered Feb 2 1927

BANKERS TRUST COMPANY Registrar

By Assistant Secretary.

No. NQ58089
92 Shares11-4-29
No. NQ58089
92 SharesINCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK
AMERICAN TELEPHONE & TELEGRAPH
COMPANY.

SHARES \$100 EACH

THIS IS TO CERTIFY that Grace C. West is the owner of Ninety-Two Shares of the Capital Stock of the American Telephone and Telegraph Company transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 2nd day of February, 1927.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

H. N. DUNHAM,
Assistant Treasurer.T. D. BOWEN,
Vice President.

Canceled

(Perforated mark) Canceled 11-4-29 A T & T Co
(Perforated mark) Canceled 11-4-29 B T Co

Power of Attorney Attached.

We hereby certify that we have no ownership or interest in the shares of the stock above transferred, the transfer by the owner to us being merely for the purpose of sale.

PAINE, WEBBER & Co.,
25 Broad St., N. Y. C.

This space must not be covered in any way

Transfer of Stock.

KNOW ALL MEN BY THESE PRESENTS, That
for value received have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto Paine, Webber & Co., 25 Broad St., New York, 92 Shares of the capital stock of the American Tel. & Tel. standing in my name on the books of said corporation represented by Certificate No. NQ58089 herewith and do hereby constitute and appoint Paine, Webber & Co. true and lawful attorney, irrevocable for and in name and stead, to sell, assign, transfer and set over, all or any part of said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that said attorney or substitutes shall lawfully do by virtue hereof.

Date Nov. 2-1929

Signed and acknowledged in the presence of
R. M. Brown.GRACE C. WEST.
Signature Guaranteed by Paine, Webber & Co.

We hereby irrevocably constitute and appoint N. Lurie our substitute to transfer the within named stock under the foregoing power of attorney with like power of substitution.

Witness:

New York, Nov. 2, 1929

PAINE, WEBBER & Co.

Countersigned
By C. B. SMALL,
AMERICAN TELEPHONE & TELEGRAPH COMPANY

Transfer Clerk.

Units (1) () (3) (4) (5) (6) (7) (8) (9) (0)
Tens (1) (2) (3) (4) (5) (6) (7) (8) () (0)

PLAINTIFFS' EXHIBIT 2.

**Vol. X, The Ohio Bar Association Report of April 12, 1937,
pages 369 to 381, inclusive.
(Filed December 17, 1937.)**

**WEST ET AL., APPELLEES, v. AMERICAN TELEPHONE &
TELEGRAPH CO., APPELLANT.**

Corporations—Wrongful transfer of stock—Conversion—Life estate in stock with remainder over—Transfer to life tenant absolutely—Sale and transfer to bona fide purchaser—Corporation liable for return of stock—Action by remaindermen for damages—Demand for return prerequisite.

1. A wrongful transfer by a corporation of certificates of its stock, with knowledge of the rights therein of a third person, will render such corporation liable as for conversion.
2. Where title to stock is vested in one for life, with remainder in another, and the corporation wrongfully transfers such stock to the life tenant absolutely, and thereafter transfers it to a bona fide purchaser from such life tenant, the remainderman is entitled to demand of the corporation the return of these certificates of stock or of other stock of equal par value, the same to be issued in such a manner as will protect the interests of all parties concerned.
3. In the event of refusal or inability to comply with such demand the remainderman may maintain an action against the corporation for damages for such refusal or failure. But until such demand is made, no cause of action exists against the corporation.

(Decided November 9, 1936.)

APPEAL: Court of Appeals for Cuyahoga county.

Messrs. Garfield, Cross, Daoust, Baldwin & Vrooman,
and *Mr. Maurice J. West*, for appellees.

Messrs. Tolles, Hogsett & Ginn, Mr. William B. Cockley and *Mr. P. J. Mulligan*, for appellant.

MONTGOMERY, J. Charles P. West, Sr., died March 21, 1926, leaving as his next of kin the two plaintiffs-appellees, his sons, and leaving his widow, Grace C. West, who was, incidentally, both the aunt and the stepmother of the plaintiffs. The widow and the two sons are all now living.

The decedent died testate, and items two and three of his will are in the following language:

"Item II. I give, devise and bequeath to my beloved wife Grace C. West in lieu of her dower and year's support, the use, income, rents and profits of all of my property of every kind and nature and wheresoever the same may be located, for and during her natural life, to use, enjoy and dispose of the same as she may deem best.

"I hereby give to my said wife authority with the consent and advice of my two sons hereinafter named, with-

out the intervention of the Probate Court, to convert any or all of my real estate or securities into money and to invest and reinvest the same and any other moneys I may have at the time of my decease, in such manner as she and my said sons may determine.

"Item III. After the decease of my said wife, I direct that all my said property be divided equally between my two sons, Charles Peyton West, and Maurice John West, share and share alike or their heirs per stirpes, or in case of the death of either without leaving lawful heirs of his body, then all of said property shall go to the survivor of them."

The widow was named as executrix, without bond, qualified as such in the Probate Court of Cuyahoga county, paid all the debts of the estate and the costs of administration. Thereafter, on January 14, 1927, the executrix filed in the Probate Court of Cuyahoga county an application which listed among the assets of the estate shares of the capital stock of various corporations, included therein being 92 shares of the capital stock of the appellant, American Telephone & Telegraph Company. The application recited:

"Your applicant further says that by the terms of the last will and testament that all said stocks are bequeathed to her for and during her natural life. Your applicant, therefore, asks the court to transfer said stocks to her, the within named Grace C. West."

Attached to this application appeared the following, duly signed:

"We, the undersigned, Charles P. West, Jr., and Maurice J. West, hereby consent to the foregoing distribution in kind."

The Probate Court entered an order which, after reciting the application and the consent heretofore referred to, concluded with:

"Wherefore said application is granted, and it is by the court ordered that said applicant, Grace C. West, be and she is hereby authorized and directed to distribute in kind and transfer unto herself as the widow of said Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks as prayed for."

On February 2, 1927, Grace C. West delivered at the transfer office of the appellant in New York City the certificates for the 92 shares duly endorsed by her as executrix, together with a certified copy of the will of the decedent, of her application with the consent of the appellees attached, and of the journal entry of the Probate Court, and, upon the production of these documents, the appellant caused to

be issued a new certificate for said 92 shares to Grace C. West, individually, and without limitation.

Some time thereafter, presumably in 1929, Grace C. West sold these shares of stock represented by her certificate to an innocent purchaser for value, and on November 2, 1929, this purchaser presented the certificate, with the duly executed transfer by Grace C. West, at the transfer office of the appellant and obtained in lieu thereof a new certificate issued to such bona fide purchaser.

The record shows that the appellees had no notice until the spring of 1934 of the fact that the stock had been transferred to Grace C. West individually, or that she had sold and transferred the same to any other person. In June, 1934, they brought suit against the appellant for the value of the stock on the theory of conversion.

The amended answer filed by the company contained three defenses: first, that each of these transfers made by it was regularly and properly made, and that consequently there was no liability attached to it; second, that the plaintiffs were estopped by their conduct from raising this claim in this action; and, third, that their cause of action, if any, was barred by the statute of limitations of four years.

The cause came on for trial in the Court of Common Pleas before a jury, and, during the progress of the trial, by consent of counsel the jury was discharged and the cause was submitted to the court. While the trial court in his opinion used expressions which might indicate an uncertainty as to the nature of plaintiffs' cause of action, he, nevertheless, apparently did treat the cause as one for damages for trover or wrongful conversion of property, and found on behalf of the plaintiffs and rendered judgment against the defendant in the sum of \$29,526.47, being the amount which he found to be the value of the stock as of November 4, 1929, together with interest thereon at 6% from that date.

From that judgment an appeal was perfected to this court upon questions of law. For some reason counsel for appellant do not assign as error the failure of the trial court to sustain the motion of the defendant for judgment at the conclusion of the plaintiff's evidence, or at the conclusion of all the evidence, although the record shows that such motions were made. However, one assignment of error is that the court overruled the appellant's motion for a new trial, and a reference to that motion shows that one ground of it was that the judgment of the trial court was contrary to law, and it seems to us that counsel have thereby saved the question, and that this court can with propriety consider the proposition as to whether or not the

defendant was entitled to judgment upon the pleadings and the evidence.

We find no difficulty in arriving at the conclusion that this corporation was at fault in making these transfers as they were made. It had before it a copy of the will of the testator with the other papers attached. These papers clearly show that Grace C. West had only a life estate in the property and that these appellees had an interest therein as remaindermen. The company was put upon its guard, and in issuing new certificates of stock did so at its peril, if it did not issue the same in accordance with the rights of the interested parties thereto. Having made this wrongful transfer to the widow in 1927, it was not protected or saved by her subsequent transfer of the stock to a bona fide holder in 1929. While, as stated by counsel for the appellees, the original transfer to the executrix, as an individual, was wrongful, the subsequent transfer to an innocent holder wrought the harm.

Furthermore, we cannot, and do not, find that the plaintiffs were estopped from asserting any claim against this corporation; they consented to nothing more than the distribution of the stock in kind.

The general proposition is correctly stated in 6 Thompson on Corporations (3 Ed.) 307, Section 4435, wherein it is held that:

"A wrongful transfer with knowledge of the claims or rights of a third person will render a corporation liable as for conversion."

An interesting case is that of *Stewart et al., Trustees, v. Firemen's Ins. Co. of Baltimore*, 53 Md., 564, where, in discussing a state of facts somewhat similar to the facts in the instant case, the court held:

"There was such negligence on the part of the appellee's officers, (it being chargeable with knowledge,) in allowing the transfers of the stock to be made, as rendered the appellee responsible to appellants for the resulting loss."

There is, therefore, in our judgment, no question as to the wrongful and harmful act of this corporation, and that, as a result thereof, the appellees have some basis of action against it. Taking the view which we do, however, there is no occasion for passing upon the defense of the statute of limitations or the question as to whether the trial court correctly figured the damages, and these two matters become altogether unimportant.

In this case, under the facts as shown, the appellees are remaindermen. They have not at any time had, or do they

now have, the right of possession of the original certificates of stock, or of any certificates issued in lieu thereof. They have not at any time been, and are not now, entitled to any dividends upon this stock. These rights would accrue to them only upon the death of the widow. Until that time they have no right to anything in connection with this stock other than the right to have their title as remaindermen therein protected and assured.

The rule is well stated in paragraph ten of the syllabus of the case of *Carpenter v. Denoon*, 29 Ohio St., 379, in this language:

"A deed of conveyance by a tenant for life purporting to convey the title in fee, passes the life estate, but does not forfeit it to the reversioner or remainderman."

Of course, that case deals with real estate, but there is no difference in principle between the two, and, in our judgment, the rule there propounded is applicable to the instant case. We cannot accede to the claim of acceleration advanced by counsel for the appellees.

As we have heretofore stated, these appellees are entitled to some relief against this corporation. In our judgment they are entitled to demand of the company the return of these certificates of stock, or of other stock of equal par value, the same to be issued in such a manner as will protect the interests of all parties concerned, and will insure to these appellees the possession of the certificates and dividends thereon from and after the death of the life tenant. They are entitled, further, in the event of refusal or inability to comply with this demand, to maintain an action for damages for such refusal or failure. Until they have made such demand they have not, in our judgment, any cause of action against this corporation.

"A corporation is liable in conversion for refusal to transfer stock on its books at request of one entitled thereto." Bates' Pleading, Practice, Parties & Forms (4 Ed.), 1109, Section 1203d.

"While an action in equity may be resorted to by the transferee of stock to compel the issuance of a new stock certificate in place of the old one, and is probably the most complete and just remedy, the transferee may treat the refusal to transfer as a conversion, and bring an action at law against the corporation for damages." 10 Ohio Jurisprudence, 438, Section 317.

"Where a corporation permits an erroneous or wrongful transfer of stock, it may be compelled to replace it if there are other shares within its control, or, if there are no other shares within its control, it must respond in damages." 14 Corpus Juris, 776.

In the case of *Stewart v. Firemen's Ins. Co.*, *supra*, the court further held that the complainants were entitled to a decree compelling the company to replace the stock on their books in their names as trustees and issue a proper certificate therefor, or to pay them the market value of the stock at the time of the unauthorized transfers.

Attention is directed to the case of *Cleveland & Mahoning Rd. Co. v. Robbins*, 35 Ohio St., 483, which was a case where the railroad corporation had wrongfully issued a certificate of stock without first taking up the outstanding certificate in lieu of which the new one was issued, and the court held that the holder of the outstanding certificate had a cause of action against the railroad company. The first paragraph of the syllabus in that case is as follows:

"The issuing of the new certificates to B. & P., and the allowing the transfer of the stock to them, was a breach of the duty which the company owed to F., as the holder of the original certificates, and this breach of duty created a liability on the company to replace the stock to which F. was entitled, or to account for its value."

An interesting case is that of *Allen, Exr., v. Globe Ins. Co.*, 19 W. L. B., 198, 10 Dec. Rep., 204, a decision of the Superior Court of Cincinnati. That case, based upon facts having some similarity to the instant case, held that the wife took the personal property for life; that the presentation of the certificates of stock for transfer, the company being informed of the existence of the will fixing the several estates therein, that the latter is presumed to have knowledge of the contents of the will and is chargeable with liability to a stockholder for the value of the stock wrongfully transferred by the officers of the company. The concluding statement in the opinion is:

"As the company caused the transfer without due authority, it is bound to return to the present executor, the same or an equal amount of the stock, or to pay the value of the same in money, and for the amount of the dividends declared since the wrongful transfer."

The essential difference in the facts between the two cases, as directed to the last clause in the foregoing quotation, is that it did not involve the distinction between dividends accruing during and after the lifetime of the life tenant.

Attention is directed to the case of *Marbury v. Ehlen*, 72 Md., 206, 19 A., 648, decided by the Court of Appeals of Maryland. That case not only holds, as we hold here, the corporation liable, but also negating the claim of acceleration by the wrongful transfer, holds that the fund must re-

main intact while the trustee is alive, and is, as we view it, authority for the proposition that the corporation must restore this stock or its equivalent, insuring dividends to the appellees after the death of the widow, but permitting the payment of dividends until that time solely, to bona fide holders of the stock. The syllabus in the case of *Marbury v. Ehlen*, *supra*, as reported in 19 A., is as follows:

"1. Where stock on the books of a corporation in the name of a testator is transferred to a trustee by the executors under authority in his will, and the trustee afterwards assigns the stock on the books to another without an order from the orphan's court, as required by Code Md. 1860, art. 93 Sec. 274, and in violation of the terms of the will, and in fraud of the *cestuis que trustent*, the corporation is chargeable with knowledge of the limited powers of the trustee, and liable notwithstanding the lapse of time between the two transfers. The corporation, having been once informed that there was a will under which the trustee must act, continues chargeable with a knowledge of its terms.

"2. An assignment to the trustees of all the interests of the *cestuis que trustent* except one cannot help the corporation, since by the will the trust is for the benefit of the trustee's children now living, or that may hereinafter be born, and, the trustee being still alive, the full effect of the assignment cannot be determined, though ultimately the corporation will be entitled to be subrogated to the shares of those who have released. Until the death of the trustee the fund must remain as an entirety."

Counsel for appellees have cited and commented upon many other cases both in their briefs and in their oral argument, but none of these cases cited or commented upon are, in our judgment, parallel to the instant case, nor do the decisions therein establish any binding precedent. Those cited cases have to do with the wrongful refusal of the corporation to transfer stock to one entitled thereto, or when brought by remaindermen were brought when the same were entitled to possession, and after the death of the several life tenants.

An exception to this proposition is to be noted in the case of *Coffey v. Wilkerson*, 58 Ky., 101, decided in 1858. This case is cited by counsel for the appellees as sustaining their contention that there was an acceleration of the title to the remaindermen. The first paragraph of the syllabus of that case reads as follows:

"1. If the tenant of the life estate in slaves sell the absolute right and title in them to a negro-trader, who fol-

lows the business of taking slaves to a southern market, such sale is a conversion of the slaves to his own use in such manner as to defeat the estate in remainder, and a right of action accrues *eo instanti* to the remainder-man against the tenant for life, for the value of the slaves, &c."

The facts in that case, however, show that the purchaser of the slaves from the life tenant had sold them and they had been taken to parts unknown, and, as the court stated in its opinion, "with the effect of defeating the enjoyment of the estate in remainder." Of course, with the slaves transported to places unknown there could be no enjoyment of their use by the remaindermen when they should be entitled to possession. That is not the situation in the instant case, in view of what we have indicated, as to the rights and duties of the parties hereto.

It is to be observed that in Ohio the title to shares of stock is now determined by the Uniform Stock Transfer Act, being Sections 8673-1 *et seq.*, General Code. In Section 8673-1 it is prescribed that the title to a certificate and to shares represented thereby can be transferred only (a) by delivery of the certificate properly endorsed, or (b) by delivery of the certificate and a separate document containing a written assignment of the certificate for power of attorney to sell the same, etc.

A majority of this court had occasion to cite and construe this section as an incident to its decision in the case of *Kellogg-Mackay Co. v. O'Neal*, 39 Ohio App., 372, 381, 177 N. E., 778.

The other member of this court, as now constituted, and his associates of the First Appellate District, held in the case of *Pure Oil Co. v. Hunt, Recr.*, 46 Ohio App., 329, 188 N. E., 738, in the third and fourth paragraphs of the syllabus as follows:

"3. Corporation cannot be held for conversion of stock unless in some way it directly repudiates title of owner by refusing to give certificate force given it by statute (Sections 8673-1, 8673-6, 8673-7 and 8673-17, General Code).

"4. In an action for conversion of stock, permitting jury to allow recovery based on acts of corporation in canceling certificates upon its books held erroneous, since under Uniform Stock Transfer Act it is necessary to allege and prove direct, definite refusal by corporation to acknowledge rights conferred on owner of stock by his possession of certificate therefor (Sections 8673-1, 8673-6, 8673-7, 8673-17 and 8623-30a, General Code)."

On page 333 of this case the court in its opinion held: "If transfer of title can only be effected by delivery of the certificate, then the corporation, in order to cause a conversion of the stock, must in some way directly repudiate the title of the owner by refusing to give the certificate the force given it by the statute. Until it does so, while it may commit acts which may give the owner a right to cause rescission, there can be no conversion."

We note that our U. S. Circuit Court of Appeals, Sixth Circuit, in the case of *American Steel Foundries v. Hunt*, 79 F. (2d), 558, 561, approved the decision in the case of *Pure Oil Co. v. Hunt, Recr., supra*. The court, in the third paragraph of the syllabus in that case, held:

"3. Trover will lie for conversion of corporate shares, where transfer upon corporation's books passes title, or where transfer was caused by corporation's agents, or where corporation by some overt act in violation of its trusteeship repudiates shareholder's ownership."

In the course of its opinion, referring to the facts in the case of *American Steel Foundries v. Hunt, supra*, the court said at page 561: "Here there was neither allegation nor evidence of demand and refusal; nor evidence of any positive repudiation of appellee's ownership."

It follows that the judgment of the Court of Common Pleas will be reversed, and final judgment may be entered for the appellant.

Judgment reversed.

ROSS, J., concurs.

SHERICK, J., concurs in judgment.

SHERICK, J., concurring. I concur with my associates in the conclusion reached and the reasons assigned, except in one respect. It is my notion that the appellees' right of possession, with the proper noted limitation, has been accelerated.

Carpenter v. Denoon, 29 Ohio St., 379, is sound. Its application to shares of corporate stock, negotiable by endorsement and delivery, to me seems improper. A life tenant attempting to convey away the fee of real estate can convey no more than the life estate. His grantee may enjoy it, but he must return the fee at the death of the life tenant. In the case of the stock in question, the innocent purchaser need not restore anything; possession, voting power, or the right to future dividends. The corpus of the bequest with all its attributes has completely passed. Therefore, the rights or position of the life tenant's assignee plays no part in the question of acceleration. Surely the

remaindermen are entitled to possession as against the corporation which made the wrong possible. Its convenience should not be considered.

I do not read *Marbury v. Ehlen*, 72 Md., 206, 19 A., 648, as do my associates. The remainder in that case was left to a class that might have been augmented or decreased. The remaindermen were not determinable until the death of the life tenant. It was therefore proper that the bequest be held in its entirety until death of the life tenant determined who should receive the remainder. In the present controversy the remaindermen are determined and entitled to immediate personal possession, limited as to earnings before the death of the life tenant.

The author of the note appearing in 18 L. R. A. (N. S.), 272, which cites *Holdren v. Holdren*, 78 Ohio St., 276, 85 N. E., 537, states the general rule of acceleration of possession in those cases where a widow renounces the provisions of a will in her favor, in this fashion:

"Unless a contrary intention on the part of the testator is manifest, a renunciation by the widow of a life interest given her by the terms of the will is equivalent to its termination by her death * * *. The rule rests upon the theory that the life estate or interest is presumably to be regarded as in the nature of a charge upon the gift over, the abolition of which permits the ultimate disposition to take immediate effect."

If such happens when a widow relinquishes a life tenancy, surely the same effect must follow when she does an act with respect to this legacy's remainder which destroys the charge upon the gift over, in so far as she or her assignee is concerned.

Ross, J., of the First Appellate District, and MONTGOMERY and SHERICK, JJ., of the Fifth Appellate District, sitting by designation in the Eighth Appellate District.

M. J. WEST, Special

ATTORNEY AT LAW

27 ENGINEERS BUILDING

CLEVELAND, O.

PAY TO THE
ORDER OF*Porter 34 25 C*NATIONAL CITY BANK
OF CLEVELAND
CLEVELAND, OHIO.

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M. J. WEST, Special

DOLLARS

No. 11

1933

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PAY TO THE ORDER OF ANY BANK OR BANKER
OR THROUGH THE CLEVELAND
CLEARING HOUSE.
6-1
FEDERAL RESERVE BANK OF CLEVELAND

M. J. WEST, Special

ATTORNEY AT LAW

ENGINEERS BUILDING

CLEVELAND, O.

PAY TO THE
ORDER OF*Grace C. West**Fifteen*NATIONAL CITY BANK
OF CLEVELAND
CLEVELAND, OHIO.

6-12

M. J. WEST, Special

DOLLARS

No. 11

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Please pay to
Helen C. SpittlerTHE
FIRST NATIONAL BANK
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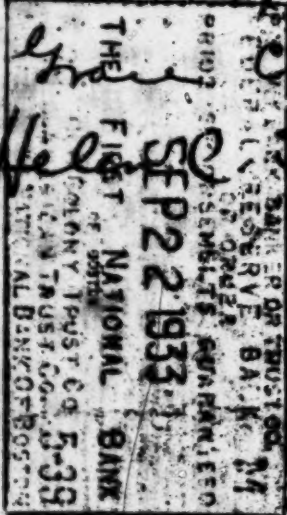
FOR DEPOSIT ONLY
RESERVE BANK
OF CLEVELAND
TRUST CO. OF CLEVELAND
NATIONAL BANK OF CLEVELAND

PAY TO THE ORDER OF ANY BANK OR BANKER
OR THROUGH THE CLEVELAND
CLEARING HOUSE.
6-1
FEDERAL RESERVE BANK OF CLEVELAND

SEP 22 1933

(Check No. 137)

Please pay to
Helen C. Spittler
Grove C. West
Helen C. Spittler



M. J. WEST, Special

Attorney at Law
Cleveland, Ohio

PAID TO THE
ORDER OF

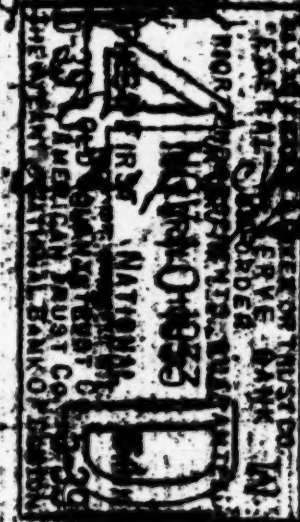
Helen C. Spittler

NATIONAL CITY BANK
OF CLEVELAND
CLEVELAND, OHIO.

6-12

(Check No. 168)

Please pay to
Helen C. Spittler
Grove C. West
Helen C. Spittler



SEP 22 1933



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88, 90, 92, 94, 96, 98,
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INCORPORATED
UNDER THE LAWS OF THE STATE OF OHIO.

47607

---24---

Capital Stock \$83,000,000.

THE CLEVELAND RAILWAY COMPANY

This Certifies that

-----CHARLES P. WEST-----

entitled to

-----TWENTY FOUR-----

Shares of the Capital Stock of The Cleveland Railway Company, transferable only on the books of the Company in person or by Attorney on surrender of this Certificate.

This Certificate is not valid unless countersigned by the Transfer Agent and also by the Registrar. Witness the seal of the Company and the signatures of the President and Secretary.

At Cleveland, Ohio, this 19th day of November, 1923



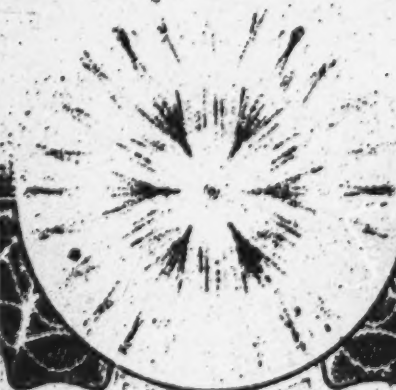
THE UNION TRUST
CLEVELAND, OHIO

NOV 19 1923

DEFENDANT'S EXHIBIT A.

Copy of Stock Certificate No. 47607 (24 Shares) of The Cleveland Railway Company, with Irrevocable Stock Power attached.

(Filed December 17, 1937.)



John Stanley

RECEIVED FROM *your b. W's*
 RECEIPT No. *6201*

For Value Received

Remboursement des dépenses

Mrs. Isaac C. West. Thanks

of the Capital Stock, represented by the within Certificate, and do hereby irrevocably constitute and appoint The Union Trust Company

Attorney

to transfer the said stock on the Books of the within named Company with full power of substitution on the premises.

Dalal 19

Charles O. West

Franc. Har. C.

Chas. C. Hart Esq.

In Presence of

Notice: The Signature to this Assignment must correspond with the name as written upon the face of the Certificate in every particular, without alteration or enlargement or any change whatever.

DEPENDANT'S EXHIBIT A (Sheet 2)

RE-ISSUED IN CERTIFICATE NO. 249

IRREVOCABLE STOCK POWER

Know all Men by these Presents,

That *I Chas. D. Mearl - Grace C. Mearl Co.*
C. D. Mearl Co.
 for value received, have bargained, sold, assigned and transferred, and by these presents do
 bargain, sell, assign and transfer unto *Grace C. Mearl Co.*

52

shares of the Capital stock of the *Cleveland Railway*
 standing in *my* name on the books of the company

The Union Trust Company

and do hereby constitute and appoint

..... true and lawful attorney, irrevocable for and in name and
 sted, to assign, transfer and set over, all or any part of the said stock, and for that purpose,
 to make and execute all necessary acts of assignment and transfer, and one or more persons
 to substitute with like full power, hereby ratifying and confirming all that said
 attorney, or substitute or substitutes shall lawfully do by virtue hereof.

IN WITNESS WHEREOF, *we* have hereunto set hand S

the *31st* day of *January* 19 *27*

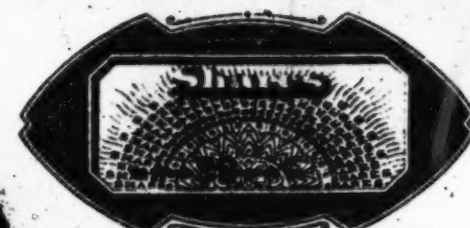
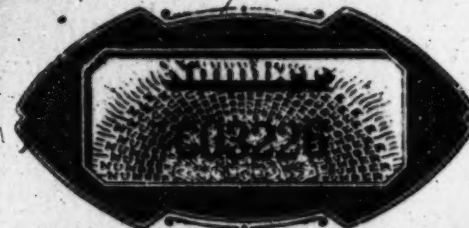
Witness:

Helen M. Spittler

Charles P. Mearl Jr.
M. G. Mearl

CERTIFICATE
FOR
LESS THAN 100
SHARES

CERTIFICATE
FOR
LESS THAN 100
SHARES



INCORPORATED UNDER THE

LAW OF THE STATE OF OHIO.

The M.A. Hanna Company

SEVEN PER CENT CUMULATIVE FIRST PREFERRED STOCK, SERIES A.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK OR CLEVELAND.

This Certifies that

---CHARLES P. WEST---

---THIRTY TWO---

CANCELLED
FEB 2 1927

is the owner of *fully paid*
and non-assessable shares OF THE PAR VALUE OF ONE HUNDRED DOLLARS (\$100) EACH OF THE SEVEN PER CENT CUMULATIVE FIRST PREFERRED STOCK, SERIES A.

FIRST PREFERRED SERIES A
The M.A. Hanna Company transferable on the books of the Company by said owner in person or by his duly authorized agent. The undersigned, who has represented the Company, has caused this certificate to be signed by its proper officers and its corporate seal to be hereunto

affixed, this *March 14th, 1924*
This certificate is not valid unless countersigned by a Transfer Agent and registered by a Registrar of the Company.

By
By
By

By
By
By

COUNTERSIGNED:
THE UNION TRUST COMPANY,
CLEVELAND, OHIO.
TRANSFER AGENT.

MAR 14 1924

DEFENDANT'S EXHIBIT B.

Copy of Stock Certificate No. 003228 (32 Shares) of The M. A. Hanna Company, with Irrevocable Stock Power attached.

IRREVOCABLE STOCK POWER

Know all Men by these Presents,

That I Charles P. Hunt - Grace C. Hunt & Co.

for value received, have bargained, sold, assigned and transferred, and by these presents do

bargain, sell, assign and transfer unto Wm. B. Grace & Co.

32

shares of the Capital stock of the M. A. Stovnia Co.

standing in my name on the books of the company

The Union Trust Company

and do hereby constitute and appoint

me true and lawful attorney, irrevocable for me and in me name and
sted, to assign, transfer and set over, all or any part of the said stock, and for that purpose,
to make and execute all necessary acts of assignment and transfer, and one or more persons
to substitute with like full power, hereby ratifying and confirming all that said
attorney, or me substitute or substitutes shall lawfully do by virtue hereof.

IN WITNESS WHEREOF, we have hereunto set

the 31st day of January 19 27

Witness:

William B. Spittler

Charles P. Hunt Jr.

W. B. West

CONTRACTS VERIFIED

LIST CTF. CASH
AT *Boeing Aircraft Co.*

88799

SUMMARY OF CERTAIN RIGHTS, PRIVILEGES, PRIORITIES, PREFERENCES, VOTING POWERS, CONDITIONS AND LIMITATIONS OF AND UPON THE FIRST PREFERRED STOCK, THE SECOND PREFERRED STOCK AND THE COMMON STOCK OF THE B. A. MANN COMPANY.

[The following text is a dense, repetitive block of small print, likely a legal disclaimer or boilerplate text, which has been largely obscured by heavy blacking out.]

DEFENDANT'S EXHIBIT C (Sheet 2)

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE IN EVERY PARTICULAR WITHOUT ALTERATION, ENLARGEMENT, OR ANY CHANGE WHATSOEVER.

For value received hereby sell, assign and transfer unto
16 shs. - M. J. West
16 shs. Charles P. West
13309 North Woodland Road, St. Louis, Mo.
of the Capital Stock, represented by the within Certificate, and do hereby irrevocably constitute and appoint
The Union Trust Company
Attorney
to transfer the said stock on the books of the within named
Company with full power of substitution in the premises
Dated 19
Mr. Grace Neal
OK [Signature]
[Signature]

UNITED COMPANY



RECEIVED IN CERTIFICATE NO. *Co 4706-7*

THIS SPACE MUST NOT BE COVERED IN ANY WAY

DEFENDANT'S EXHIBIT D.

Letter, April 4, 1934, to M. J. West from Defendant.

(Filed December 17, 1937.)

April 4, 1934.

Mr. M. J. West,
312 Engineers Building,
Cleveland, Ohio.

Dear Mr. West:

Your letter of March 28 addressed to this Company at Boston, Massachusetts, requesting information concerning shares of this Company's stock formerly registered in the name of (Mrs.) Grace C. West, has been referred to this office for reply.

Our books show that Grace C. West has not been a stockholder of record of this Company since November 4, 1929.

We are returning the certified copy of the Will and the affidavit which accompanied your letter:

Yours very truly,

WILLIAM J. STOUT,

Assistant Treasurer.

CDB:JHK
Enclosures (2)

DEFENDANT'S EXHIBIT E.

Copy of Inventory.

(Filed December 17, 1937.)

THE STATE OF OHIO,
CUYAHOGA COUNTY, ss.

To R. S. McIntosh, Merle J. Adams, G. W. Wernicke,
Greeting:

You have this day been appointed by the Probate Court of said County to make an Inventory and Appraisal of the personal goods and chattels belonging to the

Estate of Charles P. West, late of the City of Cleveland Heights, in said County, deceased:

You are, therefore, authorized and required to well and truly appraise all the personal goods and chattels of the deceased, which shall be presented to you by the Executrix, and a true and accurate inventory thereof make, and the same appraise at the true value in money, and perform such other duties as are required by law of you in the premises as appraisers, and make and sign said inventory and appraisal so that the same may be returned to this office within thirty days from the date hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Probate Court, at Cleveland, this 15th day of April, 1926.

ALEXANDER HADDEN, *Probate Judge.*

By ARTHUR J. GOUDY, *Deputy Clerk.*

THE STATE OF OHIO,
CUYAHOGA COUNTY, ss.

We, the undersigned, do make solemn oath that we will truly, honestly and impartially appraise the estate and property that may be exhibited to us, belonging to the estate of Charles P. West, deceased, and perform such other duties as are required by law of us in the premises as appraisers, according to the best of our knowledge and ability.

R. S. McINTOSH,
MERLE J. ADAMS,
G. W. WERNICKE.

Sworn to and Subscribed before me, this 20 day of April, 1926.

CHESTER H. ELLIOTT,
Notary Public.

SCHEDULE A.

Personal Goods and Chattels, belonging to the Estate of the said Charles P. West deceased, which are assets, in the hands of the administrator, as shown to us.

Shares	Description of Property	Appraised Value
92	American Telephone & Telegraph Co.	13340
50	Cleveland Railway Co.	4784
25	" " Electric Illuminating Co.	2600
15	Ohio Public Service 6%	1410
10	" " " 7%	1010
32	M. A. Hanna—preferred	1600
15	Butler Bros.	450
10	Superior Brick—Pref	300
10	" " Common	No Value
		<hr/> 25,494

SCHEDULE B.

The following is a statement of all bonds, mortgages, notes and other securities belonging to said estate, and of all debts and accounts due and owing to it.

Name of Debtor	Description of Debt	Principal	Interest	Amount Due	Appraised Value
Wm. & G. W. Eelsasser	Note	300.00	6%	300.00	300.00
Geo. & Fern Behnke	Land Contract		6%	1298.92	1298.92
Dudley B. & Mary Newport	" "		"	380.86	1680.86
Rickie Carspie	" "		"	3181.86	3181.86
J. H. & Metta C. Giebe	" "		"	2507.72	2507.72
Jacob & Rose Scheuer	" "		"	6142.52	6142.52
J. & K. Mellick	" "		"	66.04	66.04
					<hr/> 15,177.92

SCHEDULE C.

Amount of money in the hands of the ~~Administrator~~ **Executrix** or in bank, belonging to said estate:

Lorain St. Savings & Trust Co.	152.79
Society for Savings	117.38
Life Insurance	852.39
	<hr/> 1122.56

SCHEDULE D.

The said Charles P. West, deceased, leaving a widow, ~~widower, minor child~~ the following which we value at \$400.00 are not deemed assets or administered as such.

1. Household goods, live stock, tools, implements and utensils. (Not exceeding \$500.00 in value.)
2. All the wearing apparel, relics and heirlooms of the family and of the deceased, without appraisal, and ornaments, pictures and books not exceeding two hundred dollars in value.

SCHEDULE E.

The said decedent leaving a widow and no minor children under the age of fifteen years we do allow for her support of one year from the death of said decedent, the sum of Three Thousand Dollars.

We, the undersigned appraisers herein, hereby certify that the foregoing is a true and correct appraisalment of the property exhibited to us.

R. S. McINTOSH,
MERLE J. ADAMS,
G. W. WERNICKE,
Appraisers.

THE STATE OF OHIO,
CUYAHOGA COUNTY, SS.

I, GRACE C. WEST, Executrix of the Estate of Charles P. West deceased, late of said county, being duly sworn, depose and say that the foregoing inventory is in all respects, just and true; that it contains a true statement of all the estate and property of the deceased which has come to my knowledge, and also all money, bank bills or other circulating medium belonging to the deceased; and also all just claims of the deceased against myself or other persons, according to the best of my knowledge.

GRACE C. WEST, E.

Sworn to and Subscribed before me, this 21st day of April, 1926.

ARTHUR J. GOUDY,
Deputy Clerk.

We, the undersigned sons and heirs at law of Charles P. West deceased, residing in Cuyahoga County, hereby waive notice of the taking of the Inventory and Appraisal of the estate and property of said decedent, and consent that the same may be made at any time.

M. J. WEST,
CHARLES FRANCIS PEYTON WEST.

THE STATE OF OHIO,
CUYAHOGA COUNTY, SS.

GRACE C. WEST, Executrix of the Estate of Charles P. West deceased, being duly sworn on her oath says that she gave notice of the taking of the within Inventory to all the persons required by law to be notified thereof, and also posted notice in two of the most public places in Cleveland Heights, where said decedent last resided.

GRACE C. WEST.

Sworn to before me, and subscribed in my presence
this 21st day of April, 1926.

ARTHUR J. GOUDY,
Deputy Clerk.

DEFENDANT'S EXHIBIT F.**Copy of Petition filed in Common Pleas Court Case.**

(Filed December 17, 1937.)

No. 408792.

IN THE COURT OF COMMON PLEAS.**STATE OF OHIO, CUYAHOGA COUNTY, SS.**

**CHARLES PEYTON WEST,
MAURICE JOHN WEST,
312 Engineers Building, Cleveland, Ohio,
Plaintiffs,**

vs.

**AMERICAN TELEPHONE & TELEGRAPH Co.,
750 Huron Road, Cleveland, Ohio,
Defendant.**

PETITION.

Now comes Charles Peyton West and Maurice John West, plaintiffs herein, and say that American Telephone & Telegraph Company, defendant, is a corporation organized and existing under and by virtue of the laws of the State of New York and qualified to do business in the State of Ohio.

Plaintiffs say that they are the sons and only surviving children of Charles P. West, deceased; that said decedent died on the 21st day of March, 1926, leaving a Last Will and Testament, which later was admitted to probate in the Probate Court of Cuyahoga County, Ohio, in accordance with Docket No. 191, No. 154,617, by the terms of which said Charles P. West, deceased, gave, devised and bequeathed to his widow, Grace C. West, the use and income of all of his property for the period of her natural life; that after the death of his said wife, Grace C. West, said decedent directed that all of his said property be divided equally between the plaintiffs, share and share alike.

Plaintiffs further say that by said Will said Grace C. West was nominated Executrix and was, upon the death of the said decedent and the probating of said Will, named by the said Probate Court and qualified as Executrix of said Estate.

Plaintiffs say further that at the time of his decease the said Charles P. West was the owner of ninety-two (92) shares of the capital of The American Telephone & Telegraph Company, and that on or about January 14, 1927, without the knowledge of plaintiffs, said defendant American Telephone & Telegraph Company wrongfully, fraudulently and willfully caused, permitted and did themselves unlawfully transfer the certificate or certificates for said shares then in the name of said Charles P. West, deceased, to Grace C. West, without regard or reference to the limitations placed upon her estate in said shares, or the limitations contained in the Will of said decedent, or the interests of plaintiffs in said shares, although the defendant American Telephone & Telegraph Company well knew of the terms and conditions of said Will and of the limitations of the estate and respective interests of said Grace C. West and the plaintiffs herein in said shares and estate.

Plaintiffs say further that on or about November 4, 1929, without the knowledge or consent of the plaintiffs, the defendant wrongfully, fraudulently and willfully caused and permitted the sale and transfer of said certificate or certificates for said ninety-two (92) shares of capital of The American Telephone & Telegraph Company without regard to the rights of the plaintiffs therein, and without regard to the nature of the interest of Grace C. West in said shares, and wrongfully, fraudulently and willfully permitted and caused the sale and transfer of said shares to parties unknown to these plaintiffs, thereby greatly damaging these plaintiffs as they believe.

Plaintiffs say further that they had no knowledge of the wrongful acts of the defendant herein complained of prior to March, 1934.

Plaintiffs say further that the defendant was at all times informed as to the nature of the interests of said Grace C. West and of these plaintiffs in said shares of capital of American Telephone & Telegraph Company, and that as a direct and proximate result of defendant's wrongful, fraudulent and willful acts plaintiffs were damaged to the extent of Twenty-five Thousand Dollars (\$25,000.00).

WHEREFORE plaintiffs pray judgment against the defendant in the sum of Twenty-five Thousand Dollars (\$25,000.00) together with interest from November 4, 1929, and their costs herein.

(Signed) M. J. WEST,

(Signed) GARFIELD, CROSS, DAOUST, BALDWIN &
VROOMAN,

Attorneys for Plaintiffs.

(Duly Verified.)

PREGIPE.

To the Clerk:

Please issue summons, returnable according to law, for the defendant herein, American Telephone & Telegraph Company. Endorse same "Action for Money Only. Amount claimed \$25,000.00, with interest from November 4, 1929."

(Signed) M. J. WEST,

(Signed) GARFIELD, CROSS, DAOUST, BALDWIN &
VROOMAN,

Attorneys for Plaintiffs.

DEFENDANT'S EXHIBIT G.

**Copy of Amended Answer Filed in Common Pleas
Court Case.**

(Filed December 17, 1937.)

AMENDED ANSWER.

(Caption Same as on Petition in Defendant's Exhibit F.)

FIRST DEFENSE

Now comes American Telephone & Telegraph Company, defendant herein, leave of court having first been obtained to file this amended answer, and for its amended answer:

Admits that it is a corporation organized and existing under the laws of the State of New York and qualified to do business in the State of Ohio; admits that the plaintiffs are the sons and only surviving children of Charles P. West, deceased; and admits that said Charles P. West died March 21, 1926, leaving a last will and testament which was admitted to probate in the Probate Court of Cuyahoga County, Ohio, in accordance with docket No. 191, No. 154617.

Avers that by the terms of said last will and testament which is on file in the Probate Court of Cuyahoga County, Charles P. West devised and bequeathed to his widow, Grace C. West:

"The use, income, rents and profits of all of my property of every kind and nature and wheresoever the same may be located, for and during her natural life, to use, enjoy and dispose of the same as she may deem best. I hereby give to my said wife authority, with the consent and advice of my two sons hereinafter named, without the intervention of the Probate Court, to convert any or all of my real estate or securities into money and to invest and re-invest the same and any other moneys I may have at the time of my decease as she and my said sons may determine."

Admits that said will provided that after the death of said Grace C. West all of the property should be divided equally between the plaintiffs, share and share alike; admits that by said will Grace C. West was nominated Executrix and thereafter qualified and acted as such; and admits that at the time of his death Charles P. West was the owner of 92 shares of the common capital stock of American Telephone & Telegraph Company.

Avers that on or about January 14, 1927, Grace C. West duly filed in the Probate Court of Cuyahoga County, Ohio, an application reciting that the debts of said estate had been paid; that there remained in her hands, among other stocks, 92 shares of the common stock of American Telephone & Telegraph Company; that all of said stocks were bequeathed to Grace C. West for and during her natural life and asking the Court to transfer said stocks to her; that the plaintiffs, Charles P. West and Maurice J. West, consented to such distribution in writing; that thereupon said Probate Court issued its order whereby it granted said application and authorized said Grace C. West to—

"distribute in kind and transfer unto herself as the widow of said Charles P. West, Deceased, and the distributee entitled thereto, the aforesaid stocks, as prayed for.";

that the plaintiffs knew of and consented to the making of said order and to the disposition of said stock to said Grace C. West.

Avers that shortly thereafter Grace C. West tendered to the defendant certificates of stock for 92 shares of the common stock of the defendant, duly endorsed by her as Executrix of the estate of Charles P. West, deceased, re-

requested the issuance of a new certificate for said amount in the name of Grace C. West and submitted therewith a copy of the Will of Charles P. West, deceased, a copy of her letters of administration and a copy of said order of said Probate Court directing distribution to Grace C. West.

Thereupon this defendant issued a new certificate of said common stock in the name of said Grace C. West.

Defendant avers that nearly three years thereafter and on or about November 4, 1929, said certificate of stock for said 92 shares of the common stock of the defendant was submitted to the defendant by Paine, Webber & Co., brokers with offices at 25 Broad Street, New York City, with power of attorney attached duly executed by Grace C. West and assigning and transferring said stock to said Paine, Webber & Co.; that at that time the defendant had no notice or knowledge of the will of Charles P. West; that thereafter the defendant did transfer said stock in accordance with said assignment and in conformity with the Uniform Transfer Act of the State of New York.

The defendant further avers that Grace C. West is now living and that this action is prematurely brought.

The defendant denies each and several the averments of the plaintiffs' petition except those hereinbefore expressly admitted or otherwise averred.

SECOND DEFENSE

For its Second Defense defendant refers to and incorporates as though herein rewritten the admissions, averments and denials of its First Defense and says further:

The Will of said Charles P. West contained no provision for a trustee of his property and gave his widow, said Grace C. West, possession of all his property during her life without requiring her to furnish any bond. In such a case, unless objection is raised by the executor or remainderman, it has been the uniform and common practice of the Probate Court of Cuyahoga County to order distribution of all personal property to the life tenant without requiring bond and to direct that shares of stock be transferred to the name of the life tenant without making any reference to the remainder interest. This practice was uniform and notorious and well known to the plaintiffs.

Plaintiffs not only had notice of the Executrix's intention to make distribution in conformity with said practice, but plaintiffs also expressly consented in writing to such distribution whereby the certificate representing 92 shares of capital stock of defendant was transferred to the individual name of Grace C. West.

Plaintiffs made no request of the Probate Court at any time that said certificate be transferred in such form as to set forth the life tenancy of Grace C. West and plaintiffs made no application at any time to require the said Grace C. West to execute in their favor a refunding bond or other security for their protection in the event that said Grace C. West converted said stocks to her own use.

Defendant transferred said stock to Grace C. West in her individual name relying upon the order of said Probate Court directing said distribution, and upon the conduct of the plaintiffs as hereinbefore set forth, and in consequence thereof plaintiffs are now estopped to deny the legality and propriety of said transfer and are now estopped from making each and several the claims asserted by them in their petition.

THIRD DEFENSE

For its Third Defense defendant refers to and incorporates as though herein rewritten the admissions, averments and denials of its First Defense and Second Defense and says further:

Even if it should be held that defendant acted wrongfully in transferring shares of defendant on January 14, 1927 and on November 4, 1929, as alleged by plaintiff, plaintiff's cause of action accrued more than four years prior to the filing of plaintiff's petition and is now barred by the statute of limitations as provided by the General Code of Ohio.

WHEREFORE, the defendant having fully answered prays that it may go hence with its costs.

TOLLES, HOGSETT & GINN (signed)

WILLIAM B. COCKLEY (signed)

*Attorneys for Defendant American
Telephone & Telegraph Com-
pany.*

(Duly Verified.)

DEFENDANT'S EXHIBIT H.**Copy of Reply to Amended Answer filed in Common Pleas Court Case.**

(Filed December 17, 1937.)

REPLY TO AMENDED ANSWER.

(Caption Same as on Petition in Defendant's Exhibit F.)

Now come the plaintiffs, leave of court having first been duly obtained for filing instant their reply herein to defendant's amended answer, and re-aver all of the allegations and averments of the petition as though herein fully set forth.

Plaintiffs admit that said Last Will and Testament of Charles P. West was on file in the Probate Court of Cuyahoga County, and that it contained provisions substantially as set forth in the first defense of said Amended Answer, and that the defendant did, in fact, have notice and knowledge of said will and the terms thereof as admitted in the third main paragraph, page 2, of said amended answer.

Further replying to said amended answer, plaintiffs deny each and every allegation therein contained, not herein expressly admitted to be true.

WHEREFORE having fully replied to defendant's answer, plaintiffs pray for judgment as heretofore requested in their petition.

(Signed) M. J. WEST,

(Signed) GARFIELD, CROSS, DAOUST, BALDWIN &
VROOMAN,*Attorneys for Plaintiffs.*

(Duly Verified.)

DEFENDANT'S EXHIBIT I.

Stipulation of Counsel.

(Filed December 17, 1937.)

(Caption of this Case Omitted.)

It is hereby stipulated between counsel for the respective parties that the case of Charles Peyton West and Maurice John West, Plaintiffs, vs. American Telephone & Telegraph Company, Defendant, Cause No. 408,792 on the docket of the Common Pleas Court of Cuyahoga County, Ohio, was tried upon the merits and judgment was rendered in said Court in favor of the plaintiffs against the defendant. Said judgment was thereafter reviewed on error in the Court of Appeals of Cuyahoga County, Ohio, and judgment therein was rendered in accordance with the mandate of said Court of Appeals as the same appears on the docket of the Common Pleas Court of Cuyahoga County, Journal 280, page 2560. No opinion of the Court of Appeals was filed with the record of said cause, although copies of such an opinion were furnished by the Court to counsel of record. Thereafter the plaintiffs duly filed a motion in the Supreme Court of Ohio to require said Court of Appeals of Cuyahoga County to certify its record in said cause. The plaintiffs alleged in said motion that the Court of Appeals had reversed the judgment of the Common Pleas Court in favor of the appellants and entered "final judgment against the appellants (plaintiffs herein) and in favor of appellee (defendant herein)." The plaintiffs in said motion further alleged that there was "probable error" in the proceedings of said Court of Appeals. After hearing the Supreme Court of Ohio denied said motion to certify.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,

Attorneys for Plaintiffs.

WILLIAM B. COCKLEY,
Attorney for Defendant.

DEFENDANT'S EXHIBIT J.
Mandate of State Court of Appeals.

(Filed December 17, 1937.)

Entry in Cuyahoga County Common Pleas Court
Records, Journal 280, Page 2560

"Charles Payton West, et al.
vs.
American Telephone &
Telegraph Co. } No. 408792
No. 15504—Law

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

On the 9th day of November, 1936 there was filed in this court a Mandate from the Court of Appeals, which is as follows, to-wit:

This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies, that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed for reason stated in opinion on file and final judgment is hereby rendered for appellant, no other error appearing in the record, and this cause is remanded to said Court of Common Pleas.

It is therefore considered that said appellant recover of said Appellee its costs herein.

ORDERED, that a special mandate be sent to said Court of Common Pleas, to carry this judgment into execution. The appellee excepts.

I, John J. Busher, Clerk of our said Court of Appeals, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said court.

Witness, my hand and the seal of said Court, at Cleveland, this 9th day of November, A. D. 1936.

(Seal)

JOHN J. BUSHER, *Clerk,*
By EDWARD T. MURRAY, *Deputy.*

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, CUYAHOGA COUNTY.

*To the Honorable Court of Common Pleas in and for the
County of Cuyahoga, Greeting:*

You are Hereby Commanded, that, without delay, you
cause the foregoing judgment of our said Court of Appeals
to be carried into complete execution.

Witness, John J. Busher, Clerk of our said Court of
Appeals, and the seal thereof, at Cleveland, this 9th day of
November, A. D. 1936.

JOHN J. BUSER, *Clerk,*
By EDWARD T. MURRAY, *Deputy.*

(Seal)

MEMORANDUM OPINION OF COURT.

(Filed March 17, 1938.)

WEST, J.

This is a suit in equity in which the plaintiffs' bill alleges that by the will of Charles P. West, ninety-two shares of stock in the defendant company were bequeathed to Grace C. West, his widow and executrix, for her life, with remainder to the plaintiffs. That thereafter, without their knowledge or consent, but with full knowledge of their rights as remaindermen, the defendant transferred this stock to the widow and delivered to her a certificate without qualification, upon the face of which she alone appeared as owner; that thereafter she assigned the stock to an innocent purchaser for value, and that plaintiffs first obtained knowledge of these transfers in 1934. That on June 18, 1937, after the conclusion of an action which they brought against the defendant to recover their loss, wherein judgment went for the defendant, the plaintiffs made demand on the defendant for restoration of the stock in question, with dividends and interest. And the plaintiffs in the instant case pray that defendant be ordered to issue and deliver to them a certificate for ninety-two shares and account for dividends paid since November 2, 1929 with interest, as well as for damages equalling the difference between the highest intermediate value and the value of the shares at date of demand, with interest; and that defendant be ordered to restore to them their rights in the stock; and the court declare the rights and obligations of the parties in the premises and for such further relief as justice and equity may require.

To this bill the defendant pleads as a bar the former adjudication in its favor in the state court; the statute of limitations; estoppel based on proceedings in the probate court of Cuyahoga County to effect distribution of said stock "in kind" to the widow; and plaintiffs' alleged consent to the transfer to her without limitation, with reliance thereon by defendant and its good faith in making the transfers in question; and also the laches of plaintiffs.

The former judgment relied on as *res judicata* was pronounced by the state court of appeals after reversing the judgment of the common pleas in plaintiffs' favor "for reasons stated in opinion on file" in which the judgment entry recites "final judgment is hereby rendered for appellant" (the defendant).

In my opinion this judgment, which the supreme court of Ohio refused to review, while final, does not bar the

present suit. In *Baltimore S. S. Co. v. Phillips*, 274 U. S. 317, 319, it is said:

"The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action."

And the former suit was not on the same cause of action as the present one. In the above case, at p. 321, after stating that a cause of action does not consist of facts but of the unlawful violation of a right which the facts show, it is stated:

"The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, but the *result of these in a legal wrong, the existence of which, if true, they conclusively evince.*"

The pleadings in the former case disclose that the facts alleged therein are not all the facts contained in this bill. No demand on defendant to restore the stock or plaintiffs' rights therein was set out. This omission was not due to carelessness of the pleader, for when the former action was filed, no demand had been made, and it was impossible to aver demand. Should it be claimed that this omission in the pleading does not necessarily negative a previous demand, the answer is that if demand had in fact been made, it is defendant's obligation to set up that fact and prove it in the present case in order to perfect its plea of *res judicata*.

It is clear that demand is required in such a case, and without it no cause of action is stated. *American Steel Foundries v. Hunt*, 79 F. (2d) 558, 561 (6 C. C. A.); *West v. American Tel. & Tel. Co.*, 54 Oh. Ap. 369. The former judgment, in the language of the Supreme Court in *Cromwell v. County of Sac*, 94 U. S. 351, 352—

"is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

As no demand was made previous to the former action, evidence of such demand could not in that case have been offered. *Kelliher et al. v. Stone & Webster*, 75 F. (2d) 331, 332. At p. 333 it is said:

"The test of identity usually laid down is whether the same evidence would suffice to sustain both."

The evidence in the former action, which we are justified in saying did not include any demand, would not sustain the present suit wherein demand is alleged. It being plain that a legal wrong arises from the facts alleged and proved in the present case, while in the former no such wrong was either alleged or proved, identity of causes of action necessary to a plea of *res judicata* is wanting. In deciding on this point it is not at all necessary to look to the opinion of the court of appeals; nor does the finality of the judgment of that court have any significance; the judgment merely concludes the parties from disputing that in the former case the plaintiffs did not establish a right to recover damages; it did not bar them from asserting a similar right or a claim in equity for restoration of the stock or their rights in it, in a subsequent suit on pleadings and proof such as we now have.

The suit is not barred by the statute of limitations, for plaintiffs' cause of action was not perfected before June, 1937, and their bill was filed less than a month later. *Railroad Co. v. Robbins, Admr.*, 35 O. S. 483; *Steverding v. Stove Co.*, 121 O. S. 250; *West v. Amer. Tel. & Tel. Co.*, *supra*. While this court does not refer to the opinion in the last cited case to qualify the plain and unambiguous judgment on the merits formerly rendered in defendant's favor, it has the right to and does treat it as the latest Ohio authority on many of the questions involved herein. The court had before it a copy of the will and the widow's application for an order of distribution in kind on which plaintiffs' consent to the distribution was indorsed (Ex. 11), and was of opinion that plaintiffs were not estopped and had consented to nothing more than distribution of the stock in kind, evidently meaning that their consent extended to distribution to the widow of a life estate only, with remainder to them. There is now before this court a stipulation of the parties which contains the order of distribution (Ex. 12) in which the probate court found that the will bequeathed the stock to Grace C. West for and during her natural life; that she desired it distributed to herself in kind, and that the next of kin had consented in writing to such distribution. This order was made under G. C. 10839 (now 10509-181) and could not operate to determine who was entitled to distribution under the will or the character of estate bequeathed; nor, of course, to divest plaintiffs of their title. *Swearingen v. Morris*, 14 O. S. 424; *Armstrong v. Grandin*, 39 O. S. 368, 374.

There is also before this court oral testimony which may be assumed not to have been before the state court, and is also relied on to support the defenses of estoppel and

laches, principally because it is said to show lack of diligence by plaintiffs in prosecuting inquiries which would have disclosed the unlawful transfer. I find the evidence entirely insufficient to establish either of these defenses.

I also agree with the majority of the court of appeals holding that none of the illegal transfers accelerated the remainder. Plaintiffs evidently base their claim to back dividends on acceleration. If the first transfer to the widow, which took place by delivery of the certificate to her in Ohio, constituted a merger of the two estates, there was no acceleration under *Carpenter v. Denoon*, 29 O. S. 379. Counsel for plaintiffs now say that the question is controlled by the law of Massachusetts, where the transfer to the innocent purchaser from the widow took place; or possibly by the law of New York, where the last transfer occurred. To meet these contentions defendant cites statutes of both states which provide that a conveyance by a tenant for life or years purporting to grant a greater estate than he possesses does not work forfeiture of his estate, thus indicating that the law of those states is the same as in Ohio.

Whatever the applicable legal principle, in this suit in which plaintiffs are asking the aid of a court of equity, they are not, I think, entitled on any equitable principle to recover on account of dividends paid during the widow's life. Acceleration leading to that result would be equivalent to enforcing forfeiture of the life estate. And, "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." *Marshall v. Vicksburg*, 15 Wall. 146, 149.

The case principally relied upon by plaintiffs on this point is *Allen, Exec. v. Globe Ins. Co.*, 19 W. L. B. 198, decided by the Superior Court of Cincinnati and affirmed by the Ohio Supreme Court without report. The language of the Superior Court on which reliance is placed, is this:

"As the company caused the transfer without due authority, it is bound to return to the present executor, the same or an equal amount of stock, or to pay the value of the same in money, and for the amount of the dividends declared since the wrongful transfer."

In its opinion in *West v. Amer. Tel. & Tel. Co.*, *supra*, the court said that the *Allen* case did not involve the distinction between dividends accruing during and after the lifetime of the life tenant. Plaintiffs' counsel seem to dispute this, for they say that dividends declared during the life of the widow were required to be accounted for. The illegal transfer occurred in August, 1885, and the widow

died on January 12, 1886, about five months later. There is no indication that any dividends were declared during this short period, nor any justification for plaintiffs' view, as opposed to the statement of the court of appeals.

Several cases cited by plaintiffs, such as *Pollock v. National Bank*, 7 N. Y. 274, and *Telegraph Co. v. Davenport*, 97 U. S. 369, concern the right of an owner of stock who was entitled to dividends thereon at all times, to recover the same; and do not deal with the situation we have here, where, under the terms of the will, plaintiffs are remaindermen only, and entitled to nothing so long as the widow lives; and she is still living.

In its opinion in the former action the court of appeals stated its view of the plaintiffs' rights in the event they made demand, and I am satisfied with this.

Finding on the issues joined will be in favor of the plaintiffs, and the defendant will be ordered to procure by purchase or otherwise and issue its certificate for ninety-two shares of its stock of the same par value and character as that disposed of by said testator's will, to a Cleveland bank or trust company to be named in the decree, to hold in trust for the legatees under Item III of the will of Charles P. West, deceased, other than Grace C. West, for and during the life of Grace C. West, with remainder to such legatees other than Grace C. West, and to record the same on its appropriate books, said certificate to be safely kept by said trustee until the death of Grace C. West, during which time defendant will not be required to pay dividends thereon, and upon her death to be delivered over to such legatees, who shall thereafter have power to receive dividends and exercise all the rights of stockholders in said defendant corporation. And it will be further ordered that if defendant fails to comply with the foregoing requirement with sixty days of the entry of decree herein, plaintiffs shall be entitled, on application to this court, to have their damages resulting from such refusal and failure duly assessed and adjudged against the defendant. Costs herein, including compensation of trustee and expense of bond in amount to be fixed in the decree, are adjudged against the defendant; and the cause is continued for the purpose of fully effectuating this decree.

S. H. WEST,

Judge.

March 17, 1938.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

(Filed July 2, 1938.)

The Court finds the facts herein as follows:

1. Charles P. West, a resident of Cuyahoga County, Ohio, died testate on March 21, 1926, leaving surviving him a widow, Grace C. West, and two sons, the plaintiffs, Charles Peyton West and Maurice John West.

2. The material portions of the Last Will and Testament of Charles P. West are as follows:

"Item II. I give, devise and bequeath to my beloved wife Grace C. West in lieu of her dower and a year's support, the use, income, rents and profits of all of my property of every kind and nature and where-soever the same may be located, for and during her natural life, to use, enjoy and dispose of the same as she may deem best.

"I hereby give to my said wife authority with the consent and advice of my two sons hereinafter named, without the intervention of the Probate Court to convert any or all of my real estate or securities into money and to invest and reinvest the same and any other money I may have at the time of my decease in such manner as she and my said sons may determine.

"Item III. And after the decease of my said wife I direct that all of my said property be divided equally between my two sons, Charles Peyton West and Maurice John West, share and share alike or their heirs *per stirpes*, or in case of the death of either without leaving lawful heirs of his body then all of said property shall go to the survivor of them."

The widow, Grace C. West, was appointed and served as executrix without bond. She is still living and at the present time is about sixty-six years of age.

3. On January 14, 1927 Grace C. West, as executrix, filed application in the Probate Court of Cuyahoga County for distribution to herself in kind of various securities in the estate, including 92 shares of common stock of the defendant. The plaintiffs consented in writing to this application and the Probate Court entered an order which after reciting "all of said stocks are bequeathed to Grace C. West, his widow, for and during her natural lifetime," directed the executrix to "distribute in kind and transfer unto herself as the widow of Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks as prayed for."

4. On or about February 2, 1927, there were delivered to the defendant at its transfer office in New York, certificates for 92 shares of common stock of the defendant duly endorsed by Grace C. West as executrix of the estate. Accompanying these certificates were certified copies (1) of her appointment as executrix; (2) of the Last Will and Testament of Charles P. West; (3) of her application for distribution in kind with consent of plaintiffs attached; and (4) of the journal entry of the Probate Court directing distribution to her. On receipt of these documents the defendant issued and delivered to Grace C. West by mail a new certificate in her name for said 92 shares of common stock, without noting thereon any limitation on her estate therein.

5. On or about October 31, 1929 Grace C. West, then living near Boston, Massachusetts, without the consent and advice of plaintiffs, delivered said certificate for 92 shares to the Boston office of Paine, Webber & Co., brokers, as collateral for her individual account there. Attached to the certificate was an assignment and power of attorney to transfer, duly executed by Grace C. West. The Boston office of Paine, Webber & Co. forwarded the certificate to its New York office and on November 2, 1929, Paine, Webber & Co. delivered the certificate, together with the assignment and power of attorney, to the defendant at its transfer office in New York City and on November 4, 1929 the defendant issued a new certificate for 92 shares to or upon the order of Paine, Webber & Co. Paine, Webber & Co. continued to hold this certificate at New York City as collateral for Grace C. West's account until September 24, 1930, at which time it sold the stock on the New York Exchange and applied the proceeds to Grace C. West's individual account. Neither Paine, Webber & Co. nor the subsequent purchaser from it knew of any limitation upon the right of Grace C. West to sell said shares.

6. Plaintiff, Charles P. West, born in 1896, is a business man in Pittsburgh, Pennsylvania. The plaintiff, Maurice J. West, born in 1898, has been a practicing lawyer of the Cleveland, Ohio, Bar, since September 1, 1927. Neither of the plaintiffs between January 14, 1927, and March 19, 1934, made any investigation of the records of the Probate Court of Cuyahoga County, Ohio, or any inquiry, either of the defendant or of Grace C. West, concerning the method in which said common shares of the defendant were transferred to her name or whether she continued to hold the certificate therefor, but in 1930 did make inquiry of the Cleveland Electric Illuminating Company,

twenty-five shares of whose stock were assets of the estate of Charles P. West, and found such stock properly issued to "Grace C. West, life tenant of the estate of Charles P. West, deceased."

7. On June 2, 1934, the plaintiffs filed a petition in the Common Pleas Court of Cuyahoga County, Ohio, against the defendant based substantially on the facts hereinbefore set forth, seeking damages for wrongful transfer of said ninety-two shares. After answer was filed by the defendant, the cause was tried on the merits and judgment was rendered by the Common Pleas Court in favor of the plaintiffs against the defendant. This judgment was reversed by the Court of Appeals of Cuyahoga County and final judgment entered in favor of the defendant on the ground that the plaintiffs had made no demand upon the defendant to restore to them their remainder interest in said shares of stock. A motion to certify was overruled by the Supreme Court of Ohio, in February, 1937.

8. On June 18, 1937, the plaintiffs, by letter, made demand upon the defendant and its attorney for the delivery to the plaintiffs of said 92 shares of stock together with an accounting for the dividends paid thereon in the meantime and for other sums. This demand the defendant refused.

From the foregoing findings of fact the Court makes the following conclusions of law:

1. The judgment of the Court of Appeals in the former suit, while final, does not support the defense of *res judicata* pleaded by the defendant in this case. No cause of action arose in this case until the plaintiffs made a demand upon the defendant and such demand was refused. In the present suit, demand by the plaintiffs and its refusal by the defendant are alleged and proved. At the time the former suit was brought no demand had been made and none was alleged or proved, and the cause of action was not identical with this one.

2. This suit is not barred by the statute of limitations. The plaintiffs' cause of action accrued upon refusal of said demand in June, 1937. The plaintiffs' bill was filed within a month thereafter.

3. The plaintiffs' consent to the order of distribution in kind did not authorize the defendant to transfer the shares of stock to the name of Grace C. West without limitation.

4. The order of the Probate Court directing distribution to Grace C. West was made under General Code Section 10839 (new Section 10509-181) and could not operate to determine who was entitled to distribution under the Will or the character of the estate bequeathed; nor could it divest the plaintiffs of their title to said stock.

5. The evidence in the case does not support the defendant's claim of estoppel and laches on the part of the plaintiffs.

6. Neither the improper transfer on the part of Grace C. West nor on the part of the defendant operated to terminate the life estate or to accelerate the plaintiffs' remainder in said stock.

7. The plaintiffs are not entitled to any back dividends or to any dividends or other rights to which Grace C. West, but for her transfer, would have been entitled during her life. Acceleration leading to such result would be equivalent to enforcing the forfeiture of a life estate.

8. The plaintiffs are entitled to have 92 shares of the defendant's common stock of the same par value and character as that disposed of by the Will of Charles P. West held by a Trustee in the name of such trustee under the control of this Court, during the life of the widow, Grace C. West, and upon her death are entitled to have said stock distributed as provided in Item III of the Will of Charles P. West; and during the lifetime of Grace C. West the defendant shall have all the rights in said stock that Grace C. West would have, had she not transferred the same, and the plaintiffs shall have all the rights in said stock to which they are entitled as remaindermen under said will. All parties except.

S. H. WEST,
Judge.

Approved as to form.

WILLIAM B. COCKLEY,
Attorney for Defendant.

GARFIELD, CROSS, DAOUST, BALDWIN AND VROOMAN,
AND
H. L. DEIBEL,
Attorneys for Plaintiffs.

FINAL DECREE.

(Filed July 2, 1938.)

This cause came on for hearing upon the Stipulation of Facts, the testimony, the argument and the briefs of counsel for the parties, and upon consideration thereof the Court finds for the plaintiffs in accordance with its separate findings of fact and conclusions of law filed herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED—

1. That The Cleveland Trust Company be and hereby is appointed trustee for the purposes of this decree, to give bond in the sum of \$2500.00 to be approved by this Court; that the defendant within sixty (60) days after the entry of this decree, shall procure by purchase or otherwise and issue to The Cleveland Trust Company of Cleveland, Ohio, as Trustee pursuant to decree of United States District Court in Equity Cause No. 5622, its certificate or certificates for 92 shares of the common stock of American Telephone and Telegraph Company and the defendant shall record the same on its appropriate books.

2. That said Trustee shall faithfully hold and keep said certificates during the life of Grace C. West and upon her death the Trustee shall make distribution of said 92 shares (including all rights inuring to plaintiffs as remaindermen) in accordance with Item III of the Will of Charles P. West as follows:

“And after the decease of my said wife I direct all of my said property be divided equally between my two sons, Charles Peyton West and Maurice John West, share and share alike or their heirs *per stirpes* or in case of the death of either without leaving lawful heirs of his body then all of said property shall go to the survivor of them.”

3. That during the life of Grace C. West defendant shall be entitled to all the rights, issues and benefits in and from said stock which were bequeathed to said Grace C. West by the Will of Charles P. West, including the right to dividends, the right to vote said stock and any other rights of a life tenant thereof, and the trustee shall give proxies and make distributions to the defendant accordingly.

4. That the costs of this action, the compensation of the Trustee, premiums of trustee's bonds, and all taxes and charges of every kind or character assessed against said stock while it is so held in trust shall be and hereby are adjudged against the defendant; and

5. That this cause is continued for the purpose of assessing plaintiffs' damages in event defendant fails or refuses to deliver said certificate or certificates of stock in trust as directed, and for the exercise of supervision over said trust until its termination, as future events and circumstances may require. All parties except.

S. H. WEST,
Judge.

Approved as to form:

WILLIAM B. COCKLEY,

*Attorney for American Telephone and
Telegraph Company.*

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,

*Attorneys for Charles Peyton West and
Maurice John West.*

**REPORT AS TO COMPLIANCE WITH DECREE
ENTERED JULY 2, 1938.**

(Filed August 30, 1938.)

Now comes defendant, American Telephone and Telegraph Company, and reports to the Court as follows:

1. Within 60 days after the entry of this Court's decree herein the defendant procured and issued to "The Cleveland Trust Company of Cleveland, Ohio, as Trustee pursuant to decree of United States District Court in Equity Cause No. 5622" certificate numbered A248246 representing 92 shares of the common stock of the defendant, recorded such issuance on its appropriate books and on August 26, 1938 delivered said certificate to The Cleveland Trust Company as trustee for the purposes of said decree.

2. On August 26, 1938 the defendant paid The Cleveland Trust Company in full its compensation for its services as such trustee.

TOLLES, HOGSETT & GINN,
WILLIAM B. COCKLEY,

*Attorneys for defendant, American
Telephone and Telegraph Company.*

(Duly Verified.)

Proof of Service.

We acknowledge receipt this August 30, 1938 of a copy of the foregoing report.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,

*Attorneys for Plaintiffs, Charles Peyton
West and Maurice John West.*

PLAINTIFFS' NOTICE OF APPEAL.

(Filed September 26, 1938.)

Notice is hereby given that Charles Peyton West and Maurice John West, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Sixth Circuit from the order and decree entered herein on July 2, 1938.

C. M. VROOMAN,
1401 Midland Building,

HARRY L. DEIBEL,
Standard Building,
Attorneys for Appellants.

PLAINTIFFS' BOND ON APPEAL.

(Filed September 26, 1938.)

KNOW ALL MEN BY THESE PRESENTS, that we, Charles Peyton West and Maurice John West, Appellants in the above cause, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto American Telephone & Telegraph Company, Appellee in the above cause, in the full and just sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to said obligee, its successors or assigns; to which payment well and truly to be made we bind ourselves, our executors, administrators and assigns, jointly and severally, by these presents.

Signed and dated at Cleveland, Ohio, this 23rd day of September, 1938.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That

WHEREAS, lately at a session of the District Court of the United States for the Northern District of Ohio, Eastern Division, in a suit pending in said Court wherein Charles Peyton West and Maurice John West were plaintiffs and American Telephone & Telegraph Company was defendant, being Cause No. 5622 in Equity on the docket of said Court, a certain decree was rendered therein on July 2, 1938 and the said plaintiffs having filed their Notice of Appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit;

Now, if said Appellants shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and effect.

CHARLES PEYTON WEST,
MAURICE JOHN WEST,

PRINCIPALS.

AMERICAN SURETY COMPANY OF NEW YORK,
By G. A. HURLBUTT,

Resident Vice President,

And D. M. HERBERT,

Resident Ass't Secretary,

SURETY.

DEFENDANT'S NOTICE OF APPEAL.

(Filed September 29, 1938.)

Notice is hereby given that American Telephone and Telegraph Company, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the decree entered in this action on July 2, 1938.

Signed: WILLIAM B. COCKLEY,
*Attorney for Appellant,
American Telephone and
Telegraph Company.*

Address: 1759 Union Commerce Building,
Cleveland, Ohio.

DEFENDANT'S BOND ON APPEAL.

(Filed September 29, 1938.)

KNOW ALL MEN BY THESE PRESENTS, that we, American Telephone and Telegraph Company, as Principal, and National Surety Corporation, as Surety, are held and firmly bound unto Charles Peyton West and Maurice John West in the amount of \$250, to be paid to said Charles Peyton West and Maurice John West, their attorneys, heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

SEALED with our seals and dated this day of October, 1938.

WHEREAS, lately, at a regular term of the District Court of the United States for the Northern District of Ohio, Eastern Division, in a suit pending in said court between Charles Peyton West and Maurice John West, Plaintiffs, and American Telephone and Telegraph Company, Defendant, a decree was rendered against said defendant

at the costs of defendant, and said defendant having filed its notice of appeal in said court to reverse the decree in the aforesaid suit, now the condition of the above obligation is that if said defendant shall pay costs assessed against it if its appeal be dismissed or the decree be affirmed or modified, then the above obligation to be void; otherwise to remain in full force and effect.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
By WILLIAM B. COCKLEY,
Attorney-in-Fact,

PRINCIPAL.

NATIONAL SURETY CORPORATION, (Seal)
By W. J. COUGHLIN,
Attorney-in-Fact,

SURETY.

STIPULATION RE CONTENTS OF RECORD ON APPEAL.

(Filed October 3, 1938.)

The above parties by their respective counsel hereby stipulate that the following portions of the record, proceedings and evidence in the Trial Court shall be included in the record on appeal:

- (1) Bill of Complaint;
- (2) Answer;
- (3) Reply;
- (4) Transcript of testimony, including plaintiffs' Exhibits 1 to 3, inclusive, and defendant's Exhibits A to J, inclusive;
- (5) Memorandum opinion of Court;
- (6) Findings of fact and conclusions of law;
- (7) Final decree of July 2, 1938;

- (8) Report as to compliance with decree;
- (9) Plaintiffs' Notice of Appeal;
- (10) Plaintiffs' Bond on Appeal;
- (11) Defendant's Notice of Appeal;
- (12) Defendant's Bond on Appeal;
- (13) Stipulation re contents of record on appeal;
- (14) Stipulation re certification of record;
- (15) Certificate of Clerk.

All of the foregoing papers shall be delivered to The Gates Legal Publishing Company for printing.

C. M. VROOMAN,
1401 Midland Building,

H. L. DEIBEL,
Standard Building,
Attorneys for Plaintiffs.

WILLIAM B. COCKLEY,
1759 Union Commerce Bldg.,
Cleveland, Ohio,
Attorney for Defendant.

Copy served 10/3/38.

STIPULATION RE CERTIFICATION OF RECORD.

(Filed October 3, 1938.)—

In accordance with Section 6 of Rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law, the Federal Rules of Civil Procedure, and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this case as set forth in the stipulation re contents of record on appeal without further comparison by the clerk.

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Copy served 10/3/38.

CERTIFICATE OF CLERK.

NORTHERN DISTRICT OF OHIO, SS.:

I, C. B. WATKINS, Clerk of the United States District Court within and for said district, hereby certify that the foregoing printed pages contain a full, true and complete copy of the record in this cause, in accordance with the stipulated designation for record on appeal filed herein.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said district, this day of November, A. D. 1938.

(Seal)

C. B. WATKINS, *Clerk,*

By K. V. WILSON,

Chief Deputy.

**PROCEEDINGS IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CAUSES ARGUED AND SUBMITTED

(October 6, 1939—Before: SIMONS, ALLEN and
HAMILTON, JJ.)

These causes are argued by Harry L. Deibel for Charles Peyton West, et al, and by William B. Cockley for American Telephone and Telegraph Company and are submitted to the court.

ORDER—No. 8140

(Entered November 16, 1939)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be and the same is hereby dismissed.

DECREE—No. 8141

(Entered November 16, 1939)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the case remanded for further proceedings in accordance with the opinion of this court.

OPINION

(Filed November 16, 1939)

Before SIMONS, ALLEN and HAMILTON, Circuit Judges.

ALLEN, Circuit Judge. Charles Peyton West and Maurice John West, as plaintiffs, filed a bill in equity praying that the American Telephone and Telegraph Company, defendant, be compelled to restore plaintiffs' right as remaindermen in certain shares of stock in the defendant corporation. The District Court entered a decree for the plaintiffs, but refused to order payment of dividends accruing since November 2, 1929, the date of the alleged unlawful assignment and sale of the stock. As appeals were prosecuted by both parties, they will be denominated as plaintiffs and defendant respectively in this opinion.

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The facts are in the main stipulated, and there is no material controversy in the evidence the two plaintiffs being the only witnesses. Charles P. West, father of the plaintiffs, died in 1926 in Cleveland, Ohio, leaving to his widow, Grace C. West, who was also executrix, a life estate in his property, and the remainder to the plaintiffs. The widow (who was both aunt and stepmother of the plaintiffs) applied as executrix to the probate court for distribution in kind of stocks of the estate, including 92 shares of stock in the defendant corporation, and the plaintiffs in writing consented to such distribution. The probate court issued an order of distribution, and a copy of this order and the application therefor, together with a certified copy of the will and letters testamentary, were presented to the defendant, which on February 2, 1927, transferred the 92 shares to Grace C. West, without in any manner indicating her limited ownership. In October, 1929, Grace C. West delivered the stock to Paine, Webber & Company, brokers in Boston, Massachusetts, as collateral for her individual account with them, together with an assignment and power of attorney to transfer. On November 4, 1929, the defendant issued a new certificate for the shares to Paine, Webber & Company.

Plaintiff Maurice John West, at that time a practicing attorney, was informed in 1930 that his stepmother had suffered great losses in the stock market, and that some of the estate securities "were gone." He demanded that his stepmother show him the certificates, and she refused. While he investigated the status of certain other stock in which his stepmother had a life interest, the remainder belonging to him and his brother, he made no further investigation with reference to the stock of the defendant company until 1934. He then wrote to the defendant and learned of the transfer to Paine, Webber & Company. Plaintiff Charles Peyton West made no investigation whatever at any time.

Suit at law for damages was instituted in the Common Pleas Court of Cuyahoga County, Ohio, on June 2, 1934. The plaintiffs were successful in the trial court, but the Court of Appeals of Cuyahoga County reversed the judg-

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ment of the trial court and rendered final judgment for defendant. Motion to certify the record in the Supreme Court of Ohio was denied. The present bill in equity was then filed in the District Court on July 14, 1937.

The defendant in its appeal (No. 8141) contends that it is not liable for the transfer of the stock because the plaintiffs consented to the distribution in kind, and that the action is barred by the Ohio statute of limitations, by laches, and by the judgment of the Court of Appeals of Cuyahoga County.

As to the first point, the defendant urges that it is not liable, upon the ground that the transfer of stock to Grace C. West without limitation was authorized by the plaintiffs. We do not agree with this contention. The defendant, having been presented with a certified copy of the will and the application for and order of distribution, had notice that Grace C. West was not entitled to receive a stock certificate indicating that she had an unlimited ownership in these shares. Each of these papers showed that Grace C. West was a life tenant only, and the will showed that plaintiffs were entitled to the remainder interest. The defendant is liable for negligence committed by its agents when the stock was transferred without limitation to Grace C. West, in February, 1927. *St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614; *American Steel Foundries v. Hunt*, 79 Fed. (2d) 558 (C. C. A. 6); *Loring v. Salisbury Mills*, 125 Mass. 138, 150.

Defendant further urges that the action is barred by the statute of limitations. In the case in the state court no demand and refusal was alleged, and the Court of Appeals reversed the judgment of the trial court upon that ground. The present case alleges and proves demand and refusal, and the District Court held that the cause of action arose at the date of the refusal of the demand in June, 1937, and that as the equity case was filed July 14, 1937, the cause of action was therefore not outlawed.

We think the District Court erred in holding that demand and refusal were necessary to the accrual of the cause of action. These plaintiffs as remaindermen have

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no immediate right to possession of the certificates. When the wrongful transfer was made, they were entitled to sue the defendant immediately for damages for the destruction of their remainder interest without any demand. *Lowry v. Commercial & Farmers' Bank*, Fed. Cas. 8581, p. 1050; *Coffey v. Wilkerson*, 58 Ky. 101; *Yeager v. Bank of Kentucky*, 127 Ky. 751. The District Court relied upon and misconstrued the decision of this court in *American Steel Foundries v. Hunt*, supra, in holding that demand was necessary. In that case the action was brought by the owner of the stock certificate against a company which had issued a new certificate for the same shares. The shares had not been issued in the name of the owner, and the holder of record had represented that the certificate had been lost. The owner sued for damages for conversion without presenting his own certificate and demanding that the corporation issue one in his name. This the court held he could not do, upon the ground that as to the rightful owner the issue of new stock was void and wholly ineffective unaccompanied by any affirmative act, such as a denial of the owner's right to receive dividends, vote, or participate in distribution of the corporate assets. *Pure Oil Co. v. Hunt*, 46 Ohio App. 329; *Steierding v. Cleveland Co-Operative Stove Co.*, 121 Ohio St. 250, and *Cleveland and Mahoning Rd. Co. v. Robbins*, 35 Ohio St. 483, are not authority for the proposition that demand and refusal are necessary in a suit by a remainderman arising out of a transfer of stock in violation of his rights. All of these cases adjudicate controversies which involve the rights of the present owner of the stock, and not of remaindermen.

The only Ohio case squarely on this subject is *West v. American Telephone & Telegraph Co.*, 7. O. O. 363, which is the decision of the Court of Appeals reversing the judgment of the trial court in favor of plaintiffs herein, in the state case. In that decision it was held that demand was necessary before the cause of action accrued, but that case also relied upon and misconstrued *American Steel Foundries v. Hunt*, supra.

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It is an interesting question whether, under *Erie Rd. Co. v. Tompkins*, 304 U. S. 64, the federal courts are bound by judgments of inferior state courts. The judgment in the state case was rendered by the Court of Appeals of Cuyahoga County. While it, of course, has persuasive force, it is not binding on the courts of appeals for the other 87 counties of Ohio. A motion to certify was made in the Supreme Court of Ohio, and overruled. This may well have been because that court did not deem the case to be of great general and public interest. Ohio Constitution, Art. IV, Sec. 2. The settled rule in Ohio is that the Supreme Court, by denial of motion to certify the record, lays down no law. It not infrequently makes pronouncements counter to those of circuit courts of appeals whose judgments it has refused to certify, on the same questions covered by those judgments. *Village of Brewster v. Hill*, 128 Ohio St. 343, 353.

In *Erie Rd. Co. v. Tompkins*, supra, the Supreme Court stated that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." The reason why state courts other than the highest court were not included in this ruling is obvious, and well illustrated in the present case. A judgment of a court of appeals for one county in the State of Ohio does not make state law, and the denial of motion to certify that case by the Supreme Court does not make state law. It is the declaration of the highest court of the state which crystallizes the law of state judicial decisions and is binding upon the federal courts. If the judgment of the state court of appeals is binding here, we have the anomalous situation of an intermediate appellate court in Ohio misconstruing a decision of this court (*American Steel Foundries v. Hunt*, supra), and a District Court upon authority of the inferior appellate court's misconstruction, making the same error, and this court following the same erroneous holding. This conclusion hardly seems logical, and we hold

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that *West v. American Telephone & Telegraph Co.*, supra, is not controlling here.

Our decision that demand was not necessary inevitably results in the conclusion that the cause of action arose when the stock was wrongfully transferred in 1927 to Grace C. West. The delay in instituting suit is fatal under the applicable Ohio statute, Section 11,224, General Code of Ohio, the pertinent portions of which read as follows:

"An action for either of the following causes, shall be brought within four years after the cause thereof accrued: . . .

"2. For the recovery of personal property, or for taking or detaining it; . . .

"4. For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated.

"If the action be . . . for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered. . . ."

Plaintiffs claim that this is an action for the recovery of personal property or for taking or detaining it, and that the cause did not accrue until the wrongdoer was discovered. If paragraph 2 were the controlling provision, the saving clause would not aid the plaintiffs here, for the principal wrongdoer might easily have been discovered in 1930, when Maurice John West was informed that some of the estate stocks had been sold, and under the statute notice sufficient to put the claimant upon inquiry is equivalent to discovery. 19 Ohio Jur. p. 462. But paragraph 2 is not applicable. The remaindermen have no right of possession so long as the life estate exists. The injury which they have suffered is an injury to their right of remainder. The applicable provision is paragraph 4, "For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated;" which carries with it no saving clause, and the action is barred under the statute.

If this cause of action dates from demand and refusal without any limitation, under plaintiffs' construction and

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under the construction of the District Court the remaindermen have it in their power indefinitely to postpone the accrual of the action by postponing demand, and thus to nullify the statute of limitations. But this is not the law. Where a condition precedent to a cause of action exists, such as demand and refusal, the cause of action does not accrue until the condition has been performed. We have held that no such condition precedent exists here, and that the action accrued at the time of the tortious transfer of the stock. But assuming that demand and refusal are necessary to the accrual of this action, it is the law that when some preliminary action is a prerequisite to the bringing of the suit, and such action rests with the claimant to perform, he cannot defeat the operation of the statute by failure to act or by long and unnecessary delay. Otherwise he would have it in his power to defeat the purpose of the statute. *Atchison, Topeka & Santa Fe Rd. Co. v. Burlingame Tp.*, 36 Kan. 628; *Palmer v. Palmer*, 36 Mich. 487; *Oleson v. Wilson*, 20 Mont. 544; *Winchester & Lexington Turnpike Co. v. Wickliffe's Admr.*, 100 Ky. 531; *Barnes v. Glide*, 117 Cal. 1. Cf. *Bauserman v. Blunt*, 147 U. S. 647; *United States v. Sligh*, 24 Fed. (2d) 636. This is also the law in Ohio (*Keithler v. Foster*, 22 Ohio St. 27). The demand under such circumstances is not to be delayed beyond the period of the statute, which in this case is four years.

This rule is peculiarly applicable where, as here, the plaintiffs have filed a bill in equity. No demand was made upon the defendant until 1934, some seven years after the conversion. It does not appear that any action has been taken against the principal tortfeasor, the life tenant. By this lapse of time the defendant may well have lost its power to protect itself by action against the life tenant. Whatever be the view, then, as to the necessity of demand, the delay of the plaintiffs bars their action.

Laches also exists and is fatal to recovery. A material consideration in this connection is the fact that the action is brought not against the life tenant, the principal tortfeasor, but against the defendant, whose wrongdoing

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constitutes mere negligence, no concealment or fraud being charged. The family relationship might perhaps account for delay in making demand if the action were against the life tenant herself. But this relationship also suggests strong possibility of collusion, and does not excuse delay as to this defendant. Maurice John West's knowledge in 1930 that some of these stocks had been sold called for action. If inquiry had then been made, the defendant might have been able to enforce its remedy against the life tenant. Laches is not measured by the statute of limitations (*Alsop v. Riker*, 155 U. S. 448). But here the delay is longer than the period of the statute, and compels the conclusion that the plaintiffs failed within a reasonable time to assert their rights. Cf. *Liverpool & London & Globe Ins. Co. v. Crosby*, 83 Fed. (2d) 647 (C. C. A. 6).

As plaintiffs' bill was not timely filed, it is unnecessary to consider the question of *res judicata*, also relied upon by defendant. Neither need we discuss the points as to acceleration and damages, upon which plaintiffs rely in their appeal. Since plaintiffs are not entitled to recover, it would be futile to define the amount and measure of their recovery.

Appeal No. 8140 is dismissed. In appeal No. 8141 the decree is reversed and the case is remanded for further proceedings in accordance with the opinion.

Judge Simons concurs in the result insofar as it denies recovery owing to laches in the demand and prosecution of the claim.

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ORDER DENYING PETITION FOR REHEARING

(Entered January 11, 1940)

The petition for rehearing is denied.

**UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Charles Peyton West, et al*, v. *The American Telephone & Telegraph Co.*, No. 8140, and *The American Telephone & Telegraph Co. v. Charles Peyton West, et al*, No. 8141, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 30th day of March, A. D., 1940.

(SEAL)

J. W. MENZIES,
Clerk of the United States
Circuit Court of Appeals for
the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1940

No. 44

ORDER ALLOWING CERTIORARI—Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is assigned for argument immediately following No. 815, Fidelity Union Trust Co. et al. vs. Field.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1940

No. 45

ORDER ALLOWING CERTIORARI—Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted and the case is assigned for argument immediately following No. 888, West vs. American Telephone and Telegraph Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9423)